

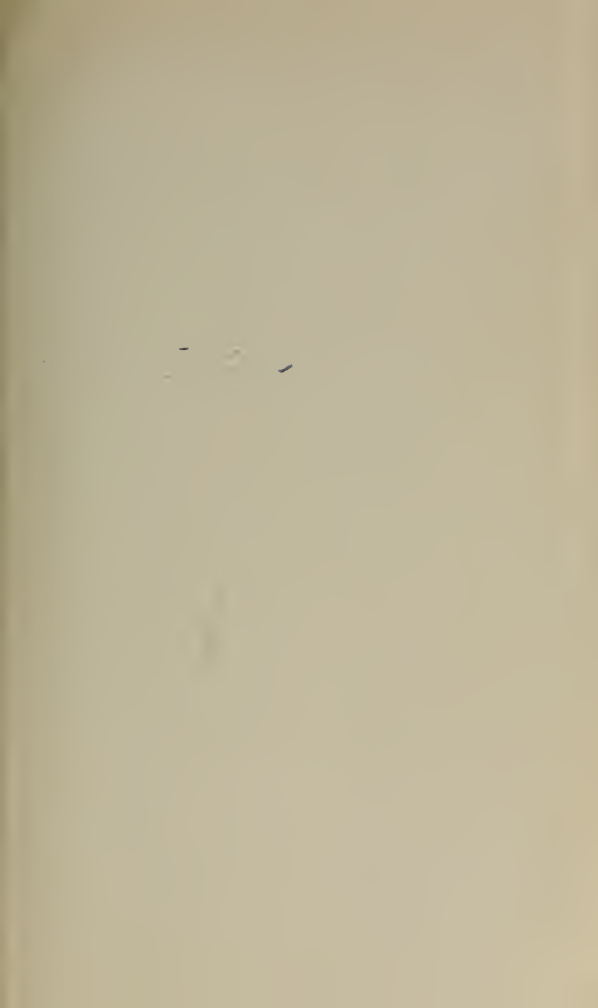
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United States
Circuit Court of Appeals
For the Ninth Circuit.

VIOLA JUANITA HATCHITT,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

JUANA SATURNINO HATCHITT,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

FILED
MAR 4 1946

PAUL P. O'BRIEN,
CLERK

No. 11205

United States
Circuit Court of Appeals
For the Ninth Circuit.

VIOLA JUANITA HATCHITT,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 4235 O'C—Civil

VIOLA JUANITA HATCHITT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 4236 O'C—Civil

JUANA SATURNINO HATCHITT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AGREED STATEMENT OF THE CASE FOR
USE ON APPEAL, UNDER RULE 76 OF
THE RULES OF CIVIL PROCEDURE

The above entitled cases in both of which the United States of America is defendant, and in each of which the same relief is sought, were consolidated for trial and so tried by the above entitled Court. This Agreed Statement of the Case is prepared and agreed to for use on appeal in each case, to wit:

[Endorsed]: Filed Dec. 3, 1945. [2]

[Title of District Court and Cause—No. 4235]

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That she is a citizen of the United States of America and of the State of California; that she is of Indian blood and descent, and is a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California; that she was born in the year 1921 and all her life has resided or maintained a legal residence upon the Palm Springs Reservation of said Band of Indians.

II.

That the Secretary of the Department of Interior of the United States, acting under the authority of the Act of Congress of January 12, 1891 (26 Stat. L. 712-714) as amended June 25, 1910 (36 Stat. L. 855-865) and March 2, 1917 (39 Stat. L. 976), did, on or about the 7th day of June, 1921, conclude and determine that, in his [3] opinion, the aforesaid Mission Indians of California were so far advanced in civilization as to be capable of owning and managing land in severalty, and did thereafter, on or about the 1st day of July, 1921, appoint one H. E. Wadsworth as Special United States Allotting Agent at Large for the Mission Indian Reservations of California and said appointment became effective on said date; that in order to carry into effect the aforesaid opinion and determination of the See-

retary of the Interior the said H. E. Wadsworth accepted, qualified and became the Special United States Allotting Agent at Large for the Mission Indian Reservations of California with authority of law in him vested to make allotments of lands in severalty to said Indians; that acting pursuant to said authority said Special Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs or Agua Caliente Reservation of Mission Indians of California in order that allotments thereof in severalty should be made by said Special Allotting Agent to the members of said Band of Mission Indians in accordance with the Statutes of the United States therefor provided.

III.

That thereafter, on or about the 21st day of June, 1923, said Special Allotting Agent, acting pursuant to instructions and directions given him by the Secretary of the Interior and the Statutes of the United States therefor provided, did allot to plaintiff the following described lands, to-wit:

Parcel (a) Homesite: Lot 27, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres:

Parcel (b) Irrigated: $N\frac{1}{2}$ $NE\frac{1}{4}$ $SE\frac{1}{4}$ $SE\frac{1}{4}$ all in Section 22, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: $NE\frac{1}{4}$ $NE\frac{1}{4}$ all in Section 24, Township 4 South, Range 4 East S.B.M., comprising forty (40) acres, totaling 47 acres, as shown by said

Special Allotting Agent's [4] Schedule of June 21, 1923, said lands being a part of the Palm Springs Mission Indian Reservation in Riverside County, California; that thereafter said Special Allotting Agent issued and delivered to plaintiff a certificate of allotment to said lands under which plaintiff became entitled to an allotment trust patent thereto and to the sole and exclusive possession and use thereof.

IV.

That thereafter, on or about the 26th day of October, 1923, said Special Allotting Agent, acting under the authority vested in him by the Secretary of the Interior and the Statutes of the United States therefor provided, did state and represent to plaintiff's mother, Juana Saturnino Hatchitt, and to plaintiff that the issuance and delivery of said certificate of allotment entitled plaintiff to enter upon and take possession of the lands allotted to her, and that said certificate of allotment was and would be evidence of plaintiff's right to possess, hold and improve said lands, pending the issuance of a trust patent therefor to her; that thereafter plaintiff, believing and relying upon said certificate and the aforesaid statements and representations of said Special Allotting Agent, did improve said lands by erecting thereon buildings and other permanent structures and improvements suitable for use for residential, commercial and business purposes at a cost in excess of the sum of Twenty-Five Thousand Dollars (\$25,000.00), and that she would not have made said improvements and would not have expended said sum

upon said lands excepting for said conduct, statements and representations of the Secretary of the Interior and said Special Allotting Agent.

V.

That thereafter, on or about the 5th day of January, 1927, the Secretary of the Interior did attempt to withdraw the allotments made by said Special Allotting Agent to the several members of the Palm Springs Band of Mission Indians in the year 1923, and thereupon did instruct and direct said Special Allotting Agent to make re-allotments [5] of the lands previously surveyed and classified to such members of said Band of Indians as had previously made or should thereafter make voluntary selections of allotments from said lands; that thereafter, acting pursuant to said instructions and directions and at the request of plaintiff's mother, Juana Saturnino Hatchitt, said Special Allotting Agent, on or about the 9th day of May, 1927, did realLOT to plaintiff the above described lands and on said date did issue and deliver to plaintiff and plaintiff accepted a certificate of allotment to the above described lands, under which plaintiff became entitled to an allotment trust patent thereto and to the sole and exclusive possession and use thereof.

VI.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent and the

aforesaid matters, facts and things, plaintiff became and at all times after the 21st day of June, 1923, has been, and is now, the equitable owner of the above described lands with the improvements she placed thereon, and at all such times has been and is now entitled to an allotment trust patent thereto and to the sole and exclusive possession and use and enjoyment thereof free and clear of all claims and demands of the defendant whatsoever.

VII.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent, it became and at all times since the 21st day of June, 1923, has been, and is now, the mandatory duty of the Secretary of the Interior to issue to plaintiff a trust patent to the above described lands, but notwithstanding said mandatory duty the Secretary of the Interior has at all such times failed and neglected to issue said trust patent to plaintiff. [6]

VIII.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent and the aforesaid matters, facts and things, the defendant is estopped to question, or deny, plaintiff's equitable title to the above described lands, or her right to an allotment trust patent thereto, or her right to the

sole and exclusive possession, use and enjoyment thereof.

Wherefore, plaintiff prays:

1. That it be adjudged, ordered and decreed by this Court:

(a) That plaintiff is and was at all times mentioned in this complaint a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California.

(b) That on the 21st day of June, 1923, the United States of America allotted, and on the 9th day of May, 1927, reallocated in severalty to plaintiff, Viola Juanita Hatchitt, the lands described in Paragraph III of this complaint, and that plaintiff is entitled to an allotment trust patent to said lands from the United States of America.

(c) That the trust period of twenty-five years provided in the Mission Indian Act of 1891 (26 Stat. L. 712), during which the lands allotted and reallocated to plaintiff shall remain in trust shall begin to run from the 21st day of June, 1923.

2. That a copy of the judgment and decree of this Court be certified to the Secretary of the Interior of the United States of America.

3. That plaintiff have such other and further

relief as justice and equity may require, including the costs of this action.

JOHN W. PRESTON, OLIVER O.
CLARK, DAVID D. SALLEE and
ROBERT A. SMITH

By JOHN W. PRESTON,
Attorneys for Plaintiff.

(Duly verified.)

[Endorsed]: Filed Feb. 9, 1945. [7]

The complaint in action No. 4236 raises the identical issues and prays for the same relief as the above complaint, with the exception of the property therein described, said property description in Action No. 4236 being as follows:

Parcel (a) Homesite: Lot 26, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: NW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 24, Township 4 South, Range 4 East S.B.M., comprising forty (40) acres. Said lands being a part of the Palm Springs Mission Indian Reservation in Riverside County, California. [8]

[Title of District Court and Cause—No. 4235.]

ANSWER TO COMPLAINT

Comes Now United States of America and for its Answer to plaintiff's Complaint herein, admits, denies and alleges as follows:

FIRST DEFENSE

I.

Admits the allegations stated in Paragraph I.

II.

Admits that on or about June 7, 1921, the Secretary of the Interior appointed H. E. Wadsworth as Special Allotting Agent at Large for the Mission Indian Reservations in California; that H. E. Wadsworth was duly qualified and authorized to act as such Special Allotting Agent; and that Special Allotting Agent H. E. Wadsworth caused the lands of the Palm Springs Indian Reservation involved in this action to be surveyed and classified. The defendant denies all other averments stated in Paragraph II. [9]

III.

Admits that the land described in Paragraph III of the Complaint lies within the exterior bounds of the Palm Springs Indian Reservation. Admits that Special Allotting Agent H. E. Wadsworth prepared an instrument entitled "Selection for Allotment" containing the name of Viola J. Hatchitt and describing the lands described in Paragraph III of the Complaint and that the instrument was delivered to Viola J. Hatchitt. De-

fendant denies all other averments stated in Paragraph III.

IV.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments stated in Paragraph IV and therefore denies the same.

V.

Admits that on or about May 9, 1927, Special Allotting Agent H. E. Wadsworth did issue and deliver to plaintiff an instrument entitled "Selection for Allotment" describing the lands described in Paragraph III of the Complaint and denies all other allegations stated in Paragraph V.

VI.

Denies the allegations stated in Paragraph VI.

VII.

Admits that no trust patent has been issued to plaintiff and denies all other allegations stated in Paragraph VII.

VIII.

Denies the allegations stated in Paragraph VIII.

SECOND DEFENSE

I.

That on or about June 7, 1921, the Secretary of the Interior duly appointed H. E. Wadsworth as Special Allotting Agent at Large for the Mission Indian Reservations in California and authorized

and directed him to prepare schedules of selections for allotment on a number of those reservations, including the Palm Springs Indian Reservation.

II.

Pursuant to his instructions, Special Allotting Agent H. E. Wadsworth caused a portion of the land in the Palm Springs Indian Reservation, including the lands involved in this action, to be surveyed and classified.

III.

Special Allotting Agent H. E. Wadsworth requested Juana S. Hatchitt, plaintiff's mother, as well as all other adult members of the Band, to choose the land each of them desired to have listed as his respective selection for allotment. Most of the adult members of the Band expressly refused to choose any lands to be listed as their respective selections for allotment. Upon the refusal of members of the Band to make voluntary selections, Special Allotting Agent Wadsworth arbitrarily designated specific tracts of land as the respective selections of those members of the Band who had refused voluntarily to select land and Special Allotting Agent Wadsworth listed the lands arbitrarily selected by him on a schedule of selections for allotment. The schedule contained fifty names representing all of the enrolled members of the Band and a description of the land designated as the selection of each Indian listed.

IV.

That on or about June 21, 1923, Special Allotting Agent H. E. Wadsworth transmitted the schedule of selections for allotment to the Commissioner of Indian Affairs in Washington, D. C.

V.

That on or about June 22, 1923, Special Allotting Agent H. E. Wadsworth prepared an instrument entitled "Selection for Allotment" for each of the fifty Indians named on the 1923 schedule of selections for allotment. Special Allotting Agent H. E. Wadsworth signed each of said certificates and offered the certificates for delivery to the selectees named therein and in the case of minors, to the parents or guardians of such selectees. Most of the members of the Band refused to accept the respective certificate in which he or she was named.

VI.

That because of the protests of the Palm Springs Indians against allotment and because the selections listed for them on the 1923 schedule had been arbitrarily selected by Special Allotting Agent H. E. Wadsworth and for other reasons, the Secretary of the Interior, on or about January 5, 1927, superseded the 1923 schedule of selections for allotment by ordering that a schedule of selections for allotment for the Palm Springs Indian Reservation be prepared to include the names of only those Indians who consented in writing to allotment.

VII.

That in March and April, 1927, written consent for allotment was obtained from twenty members of the Palm Springs Indian Band, including Viola J. Hatchitt, who consented thereto through her mother, Juana S. Hatchitt.

VIII.

That on or about May 9, 1927, Special Allotting Agent H. E. Wadsworth concluded the preparation of a schedule of selections for allotment for the Palm Springs Indian Band containing the names of twenty-four Indians and a description of the land designated as the selection of each Indian listed, and caused the 1927 schedule of selections for allotment to be forwarded through the office of the District Superintendent at Muskogee, Oklahoma, to the Commissioner of Indian Affairs in Washington, D. C.

IX.

That the 1927 schedule of selections for allotment remained pending in the Office of Indian Affairs in connection with suggested corrections, modifications and revisions as to the rights of certain of the selectees to receive allotments, as to the rights of certain of the selectees with respect to the lands selected by them and as to the correctness of the surveys of the lands described in the schedule. That in the months of June and October, 1928, and while the 1927 schedule of selections for allotment was pending in the Office of Indian Affairs, the Commissioner of Indian Affairs [12] submitted memo-

randa, endorsed by the General Land Office and addressed to the Secretary of the Interior, recommending that the Secretary approve the schedule of selections for allotment of the Mission Creek Reservation, the La Jolla Reservation and the Rincon Reservation, all Mission Indian Reservations. The Secretary approved the respective schedules of selections for allotment of the Mission Creek Reservation, the La Jolla Reservation and the Rincon Reservation, and ordered trust patents prepared and delivered to the selectees named on the approved schedules.

X.

Trust patents were prepared and delivered to the selectees named in the La Jolla and Rincon Schedules of selections for allotments. Various occupants of lands within the La Jolla and Rincon Reservations refused to surrender possession to the Indian trust patentees and on April 13, 1929, the United States of America was compelled to institute in this Court suit entitled "United States of America, as Trustee of the Allottees of the La Jolla and Rincon Reservations vs. Joseph Albanes, et al., No. A-2-M-Equity," to enjoin interference with the trust patentees. The defendants in that suit challenged the authority of the Secretary to allot any of the Mission Indian Reservations. The litigation was not completed until July 15, 1931, when final judgment was entered in favor of the United States and the Indian trust patentees. While that action was pending, the 1927 schedule of selections for

allotment of the Palm Springs Band of Indians remained in abeyance in the Office of Indian Affairs.

XI.

Commencing in 1933, preliminary steps were taken which ultimately resulted in the enactment of the Indian Reorganization Act of June 18, 1934, 48 Stat. 954, 25 U.S.C. 461 et seq., under which the allotment in severalty of Indian tribal lands was forbidden providing a majority of the Indians on the Reservation did not vote against the application of the Act. A majority of the qualified voting members of the Palm Springs Indian Band voted against the Indian Reorganization Act. Pending the vote of the Indians under the [13] Indian Reorganization Act, the 1927 schedule of selections for allotment remained in abeyance in the Office of Indian Affairs.

XII.

Thereafter, in 1935, the Secretary of the Interior sought the solution of the Palm Springs Indian problem through legislation and pending the consideration of the matter by Congress, the 1927 schedule remained in abeyance in the Office of Indian Affairs.

XIII.

That on May 8, 1936, eighteen actions ordinarily described as the St. Marie cases were instituted in this Court against the United States by members of the Palm Springs Indian Band to compel issuance of trust patents to land in the Palm Springs

Indian Reservation. One of the actions was entitled "Viola J. Hatchitt, Minor by Juana S. Hatchitt, Prochein Ami, v. United States of America, Trustee et al, No. Eq. 1209-M." The St. Marie cases ended in favor of the United States on October 14, 1940 (24 F. Sup. 237) and on appeal was affirmed (108 F. 2d 878 (CCA 9, 1940)) and certiorari was denied by the Supreme Court because petition was filed out of time (see 311 U. S. 652). Pending final determination of the St. Marie cases, the 1927 schedule of selections for allotment remained in abeyance in the Office of Indian Affairs.

XIV.

On December 24, 1940, Lee Arenas, a member of the Palm Springs Band, instituted an action in this Court entitled "Lee Arenas v. United States, No. 1321-O'C." Judgment was granted in favor of the United States and on appeal the Circuit Court for the Ninth Circuit affirmed (137 F. 2d 199). Certiorari was granted by the Supreme Court of then United States and on May 22, 1944, its opinion was rendered, reversing the decision of the Circuit Court of Appeals and remanding the case for further proceedings (322 U. S. 419). Pending the opinion of the Supreme Court, the 1927 schedule of selections for allotment remained in abeyance in the Office of Indian Affairs. [14]

XV.

Thereafter, the 1927 schedule of selections for allotment was for the first time submitted to the

Secretary of Interior for his consideration and determination as to whether the 1927 schedule should be approved or disapproved. On December 14, 1944, the Secretary of Interior, through the Assistant Secretary of Interior, after full study and consideration of the schedule and related matters, disapproved the 1927 schedule of selections for allotment of the Palm Springs Indian Reservation. The living selectees and probable heirs of the selectees listed on that schedule, including plaintiff, were promptly notified of the disapproval.

THIRD DEFENSE

I.

That on or about July 19, 1937, Viola J. Hatchitt instituted an action in this Court entitled therein "Viola J. Hatchitt, Minor, by Juana S. Hatchitt, Prochein Ami, v. United States of America et al, No. Eq. 1209-M." A certified copy of the Complaint in that action is attached hereto, marked Exhibit A, and made a part hereof.

II.

United States of America answered the Complaint by filing its Answer thereto on or about November 15, 1937. A certified copy of the Answer is attached hereto, marked Exhibit B, and made a part hereof.

III.

That as more fully appears from Exhibit A, the cause of action therein alleged was an action to cause it to be certified by this Court to the Secre-

tary of Interior that a trust patent in fee in severalty as to the lands described in Paragraph III of the Complaint should be issued out of the Department of Interior to and in favor of this plaintiff.

That the lands described in Paragraph III in action No. Eq. 1209-M are the same lands as are described in Paragraph III of the Complaint in action No. 4235-O'C. [15]

IV.

The case of *Viola J. Hatchitt v. United States of America*, No. Eq. 1209-M was later numbered Eq. 1209-Y and consolidated for trial with another action similar in nature entitled "*Genevieve F. St. Marie v. United States of America*, No. Eq. 918-Y" and sixteen other actions similar in character were also consolidated for trial. These cases are commonly known as the St. Marie cases.

V.

The St. Marie cases, including action No. Eq. 1209-Y, were tried before this Court sitting without a jury and the Court having heard the evidence and considered the arguments of counsel, made and entered its Final Decree on August 22, 1938, adjudging and decreeing that plaintiff had acquired no right to a trust patent as to the lands claimed by plaintiff in action No. Eq. 1209-Y, which lands are the same as those described in Paragraph III of the Complaint herein. A certified copy of the Final Decree in action No. Eq. 1209-Y is attached hereto, marked Exhibit C, and made a part hereof.

VI.

Viola J. Hatchitt appealed from the Final Decree, Exhibit C, and the Circuit Court of Appeals for the Ninth Circuit affirmed (108 F. 2d 876).

Thereafter, the Supreme Court of the United States on petition for a Writ of Certiorari to review the opinion of the Circuit Court of Appeals, denied the Writ, the petition having been filed out of time (311 U. S. 652).

VII.

The Final Decree of this District Court in action No. Eq. 1209-Y has become and is final and binding and conclusive upon the parties to the present action and the subject matter thereof and the Final Decree of this Court in action No. Eq. 1209-Y is *res judicata* as to all matters [16] alleged in the present Complaint, No. 4235-O'C.

Wherefore, defendant demands judgment dismissing this action with costs.

Dated: This 5th day of April, 1945.

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

JAMES A. MURRAY

Special Assistant to the Attorney General

MARVIN J. SONOSKY

Special Assistant to the Attorney General

Attorneys for Defendant

United States of America [17]

EXHIBIT "A"

In the District Court of the United States for
the Southern District of California, Central
Division

Equity No. 1209-M

VIOLA J. HATCHITT, minor, by JUANA S.
HATCHITT, Prochein Ami,
Complainant

v.

UNITED STATES OF AMERICA, Trustee, MA-
GUEL SATURNINO and FRANK COUR-
TEMANCHI

Defendants

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court
of the United States for the Southern District
of California, Central Division:

The complainant Viola J. Hatchitt, minor, by
her next friend, Juana S. Hatchitt, hereby files this
her bill of complaint, by her attorney, and respect-
fully shows to the court as follows:

1. That she is sixteen years of age, and the
daughter of Juana S. Hatchitt, Indian of the Agua
Caliente or Palm Springs Band of Mission Indians,
and the recognized head of the Indian family of
said band, and the person designated by law to
make selection for her of the land for allotment;
that complainant and her mother are duly enrolled

and recognized members of the said band, and reside upon the Palm Springs Reservation in Riverside County, California, and are each of them citizens of the United States and the State of California.

2. That the Secretary of the Interior of the United States acting under authority of the Act of Congress of January 12, 1891 (26 St. L. 712-14) as amended June 25, 1910 (36 St. L. 855-63) and March 2, 1917 (39 St. L. 975) did, on or about the 7th day of June 1921, conclude and determine that, in his opinion, the aforesaid Mission Indians of California, were so far advanced in civilization [18] as to be capable of owning and managing land in severalty, and that he did thereafter and thereunder, cause to be made allotments of lands to such Indians on said reservations, and among said Indians was your complainant, who made selection of the hereafter described lands, which the Secretary of the Interior of the United States did allot or cause to be allotted to her by causing the same to be recorded upon the official schedule of allotment, and by issuing to the complainant a certificate of selection to said lands on May 9, 1927 authorizing her to enter upon and take possession of said allotted lands as hereinafter more fully set out; that she did, in pursuance of the aforesaid authority, then and there enter upon and take possession of said lands; that the Secretary of the Interior acting under and by virtue of the authority of the aforesaid acts of Congress did, on or about

the 7th day of June 1921, appoint one Harry E. Wadsworth a Special United States Allotting Agent at Large for the Mission Indian Reservations of California, and that said appointment became effective July 1, 1921; that in order to carry into effect the aforesaid opinion of the Secretary of the Interior, the said Harry E. Wadsworth, accepted, qualified and became the Special United States Allotting Agent at Large for the Mission Indian Reservation of California with authority of law in him vested to make allotments of lands to said Indians; that acting pursuant to said authority the Special Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Agua Caliente, or Palm Springs Reservation of the Mission Indian Reservations of California; that thereafter on May 9, 1927, the said Special Allotting Agent, acting under the authority and direction of the Secretary of the Interior of the United States, and the Statutes of the United States therefor provided, did allot to your complainant the following described lands, to wit: [19]

Homesite Lot No. 27, Sec. 14, Twp. 4 S., R. 4 E. 2 Acres, Irrigated Tract, N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 22, Twp. 4 S., R. 4 E., 5 Acres Desert Land, NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 24, Twp. 4 S., R. 4 E., 40 Acres all east of the San Bernardino Meridian in California, and contained in the said Allotting Agent's schedule of May 9, 1927, said lands being part of the Agua Caliente or Palm Springs Mission Indian Reservation in Riverside County, Cali-

fornia; that under and by virtue of said allotment the said Special Allotting Agent issued a certificate to your complainant under which she became entitled to the sole use and benefit of the lands described thereunder, which are the same lands your complainant's mother, Juana S. Hatchitt had previously elected to take for complainant.

3. That, notwithstanding the facts herein alleged, and in derogation of the rights of your complainant, the defendants Maguel Saturnino and Frank Courtemanchi, did, soon after the aforesaid allotment, take possession of and now hold and occupy the following described land: Irrigated Tract, N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 22, Twp. 4 S., R. 4 E., 5 acres, east of the San Bernardino Meridian in California, being a part of the lands described in the aforesaid allotment to the complainant; that said defendants are trespassers upon the said land; that the defendants have since 1927 deprived and continue to deprive the complainant of the occupancy, use and benefit of the said land, to her loss, damage and injury in the sum of one thousand (\$1,000) dollars, for which sum she asks damages of the said two defendants; that your complainant has requested the defendants to remove from said lands and they refused and continue to refuse so to do, and now hold, use and occupy the said lands to their possession and benefit.

4. That the authority for bringing this suit and naming the United States of America as a party

defendant rests under the Act of Congress of August 15, 1894 (28 St. L. 305) and as amended by Act of February 6, 1901 (31 St. L. 760).

5. That your complainant has many times made requests upon [20] the proper agents of the United States to secure unto her an Allotment Trust Patent for the lands herein described, and which has been allotted to her as herein alleged; that she is lawfully entitled to said patent under and by virtue of the Act of Congress of January 12, 1891 (26 St. L. 712) as amended March 2, 1917 (39 St. L. 975); that said Allotment Trust Patent has not, up to this date, been issued to her by the United States of America, and that she has a vested right to the lands and patent as herein alleged.

6. That your complainant is without adequate remedy at law in the premises; that by reason of the defendants continuing trespass she suffers great and irreparable injury and damages; that she is without remedy unless given relief by this Honorable Court by a writ of injunction restraining defendants Maguel Saturnino and Frank Courtemanchi from further and continuing trespass upon the aforesaid lands.

7. That all the defendants, except the United States of America, are citizens of the State of California, residents in Riverside County, State of California, and within the jurisdiction of this Court.

Wherefore, complainant prays:

(1) That writs of subpoena issue, directed to each of the defendants commanding them and each of them to appear and make answer hereto.

(2) That it be adjudged, ordered and decreed by this Court:

(a) That the United States allotted to the complainant on May 9, 1927, for her sole use and benefit, the lands above described in this her bill of complaint.

(b) That the complainant is entitled to an Allotment Trust Patent to the said lands from the United States of America.

(c) That the defendants Maguel Saturnino and Frank Courtemanchi [21] are unlawfully using and occupying said lands.

(d) That a temporary order of injunction issue out of this court against Maguel Saturnino and Frank Courtemanchi, defendants, their agents, employees, servants and attorneys, enjoining and restraining them, and each of them, from going upon, entering, using and occupying the said described lands, or any part thereof, said injunction to be made permanent upon final hearing.

(3) That the complainant be awarded damages against the defendants Maguel Saturnino and Frank Courtemanchi in the sum of one thousand (\$1,000) dollars, to be assessed against and apportioned to each upon final hearing.

(4) That a copy of the judgment of this court be certified to the Secretary of the Interior of the United States.

(5) That complainant have such other and further relief as justice and equity may require, including costs of this suit.

(Signed) THOMAS L. SLOAN

Attorney for Complainant

District of Columbia—ss.

Thomas L. Sloan, being first duly sworn, deposes and says that he is the attorney in the above entitled action, that he has read the foregoing bill of complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

THOMAS L. SLOAN

Subscribed and sworn to before me this 16th day of July A. D. 1937.

[Seal]

FLORENCE A. SMITH

Notary Public

My commission expires April 15, 1942. [23]

EXHIBIT B

In the District Court of the United States In and For
the Southern District of California, Central
Division

No. 1209-M Equity

VIOLA J. HATCHITT, Minor, By JUANA S.
HATCHITT, Prochein Ami,
Complainant,

vs.

UNITED STATES, Trustee, et al.,
Respondents.

ANSWER TO BILL OF COMPLAINT

Come Now the United States of America, Trustee, and Maguel Saturnino and, in answer to the Bill of Complaint on file herein, admit, deny and allege as follows:

I.

In answer to Paragraph 1 said respondents admit each and every allegation contained therein.

II.

Answering Paragraph 2, said respondents deny that the Secretary of the Interior on or about the 7th day of June, 1921, or at any other time, allotted or caused to be allotted lands on the Palm Springs Indian Reservation to the Agua Caliente or Palm Springs Band of Mission Indians in California; deny that the Secretary of the Interior allotted or caused to be allotted to said complainant or to be

recorded upon an official schedule of allotment the lands described in said bill of complaint; deny that the Secretary of the Interior issued to said complainant a certificate of selection on May 9, 1927, or at any other time, authorizing her to enter upon and take possession of the alleged allotted lands; deny that said complainant did then and there enter upon and take possession of said lands; deny that said Harry E. Wadsworth was vested with [24] authority to make allotments of lands to the Agua Caliente or Palm Springs Band of Mission Indians or any other band or tribe of Indians; admit that said Harry E. Wadsworth surveyed and classified, or caused to be surveyed and classified, certain lands of the Agua Caliente or Palm Springs Mission Indian Reservation of California, but deny that said survey and classification were pursuant to authority vested in him to make allotments of lands to such Indians; deny that upon May 9, 1927, or at any other time, said Harry E. Wadsworth, or any other person, allotted to the complainant the lands described in said paragraph, or any other lands; deny that said Harry E. Wadsworth, or any other person, issued a certificate to said complainant which entitled her to the use of said lands.

III.

In answer to Paragraph 3, said respondents deny that said respondent Maguel Saturnino, soon after the alleged allotment or at any other time, took possession of, held or occupied the land described in said paragraph and on the contrary, allege the

fact to be that said land since time immemorial has been used as tribal land; deny that said respondents are trespassers upon said land; deny that said respondents have at any time deprived complainant of the occupancy, use or benefit of said land to her injury or damage in the sum of One Thousand Dollars (\$1000.00) or at all.

IV.

In answer to Paragraph 5 said respondents deny that complainant is lawfully entitled to the patent described in said paragraph, under and by virtue of the Act of Congress on January 12, 1891 (26 Stat. 712) as amended, March 2, 1917 (39 Stat. 975), or at all; deny that said [25] complainant has a vested right or any right whatsoever to the lands and patent as alleged in said Bill of Complaint.

V.

In answer to Paragraph 6 said respondents deny that said complainant is without adequate remedy at law; deny that said complainant has suffered great and irreparable injury and damages; deny that she is without remedy or relief.

As a Second, Further and Distinct Answer to the Bill of Complaint on File Herein, Said Respondents Respectfully Show:

I.

That the members of the Agua Caliente or Palm Springs Band of Mission Indians of California at all times mentioned herein have been and now are wards of the United States of America; that said

band of Indians has been since 1897 and now is resident upon the Agua Caliente Indian Reservation set aside for its occupancy and use by Executive and Congressional decree; that the legal title of said reservation is held in trust by the United States for said band of Indians and that said lands at all times have been, and now are, tribal lands.

II.

That in 1891 the Congress of the United States passed a statute (26 Stat. 712), as amended (39 Stat. 975) authorizing the Secretary of the Interior to make allotments of land to the Mission Indians of California whenever any of said Indians were, in his opinion, so advanced in civilization as to be capable of owning land in severalty; that said statute, after establishing the administrative machinery for the making of allotments, specifically provides that allotments are subject to approval by the Secretary of the Interior. [26]

That on June 7, 1921, pursuant to statutory authority, the Secretary of the Interior appointed Harry E. Wadsworth Special United States Allotting Agent at Large; that said Allotting Agent was authorized and directed to prepare a tentative allotment schedule on behalf of said Agua Caliente or Palm Springs Band of Mission Indians, for submission to the Secretary of the Interior; that when said Allotting Agent, in 1923, attempted to prepare a tentative allotment schedule large numbers of the Indians, who were opposed to the allotment system, refused to make selections of land for allotment;

that thereupon said Allotting Agent, pursuant to his instructions, arbitrarily selected lands for those Indians refusing to make voluntary selections and placed said selections on the tentative allotment schedule; that the Secretary of the Interior refused to approve said tentative allotments or any one of them;

That in 1927 the Secretary of the Interior directed said Allotting Agent to prepare another tentative allotment schedule for those members of said Palm Springs band of Indians who desired to receive allotments; that said tentative allotment schedule was prepared and certificates of selection issued to each member of said band of Indians voluntarily making a selection; that said tentative allotment schedule and said certificates of selection were submitted to the Secretary of the Interior for approval as required by law; that the Secretary of the Interior refused and does now refuse to approve said tentative allotments or any one of them, and refused and does now refuse to issue trust patents to any of said selectors, including said complainant.

That said complainant in 1927, at the time of the preparation of the second tentative allotment schedule, desired to select the lands described in her bill of complaint; that a certificate of selection was issued, covering [27] said lands.

That this tentative allotment to said complainant was never approved by the Secretary of the Interior as required by law;

IV.

That none of the members of the Agua Caliente Band of Mission Indians, including said complainant, changed his or her position because of the making of said tentative allotments; that as a matter of fact the conditions on the reservation in respect to the lands tentatively allotted were precisely the same after the tentative allotments as they were before; that said complainant has never been and is not now in possession of the irrigated tract or the desert land described in her complaint; that to the contrary, said lands have been at all times and now are tribal lands and used as such.

For a Third, Further and Distinct Answer to the Bill of Complaint on File Herein, Said Respondents Respectfully Show:

That the facts set forth in said Bill of Complaint are not sufficient to state a cause of action in equity.

As a Fourth and Distinct Answer to the Bill of Complaint, Said Respondent Maguel Saturnino Respectfully Shows:

That said cause of action against said respondent, if any there be, is barred by the Statute of Limitations in that said alleged cause of action is for a trespass upon or injury to real property and has not been commenced within three years from the date of the alleged trespass as required by Section 347, Title 25 U.S.C. and Section 338 of the Code of Civil Procedure of the State of California. [28]

Wherefore, said respondents, and each of them,

pray that complainant takes nothing by her action herein and that respondents have judgment, together with costs herein incurred; and for such other and further relief as may be proper in the premises.

Dated: November 15, 1937.

BEN HARRISON

United States Attorney,

CARL EARDLEY

Assistant U. S. Attorney,

Attorneys for Respondents United States of America, Trustec, Maguel Saturnino and Frank Courtemauchi. [29]

EXHIBIT C

In the District Court of the United States In and
For the Southern District of California, Central Division

No. Eq.-1209-Y

VIOLA J. HATCHITT, Minor, By JUANA S.
HATCHITT, Prochein Ami,
Complainant,

v.

UNITED STATES OF AMERICA, Trustee, and
MAGUEL SATURNINO,
Respondents.

FINAL DECREE

This cause having been heard on February 23, 1938, having been argued by counsel and submitted

on briefs; and the Court having announced its decision and separate Findings of Fact and Conclusions of Law having been submitted, signed and filed:

It Is Ordered, Adjudged and Decreed that the complainant take nothing by her action; and

It Is Further Ordered that neither party recover costs of suit. Exception to complainant as to both findings and judgment.

Dated: August 22, 1938.

LEON R. YANKWICH

United States District Judge

Approved as to Form as provided in Rule 44,
August 19, 1938.

THOMAS L. SLOAN and

G. M. GANNON,

By THOMAS L. SLOAN

Attorneys for Complainant.

[Endorsed]: Filed April 5, 1945. [30]

The Answer of the United States of America in Action No. 4236, makes the same admissions and the same denials and pleads the same special defenses found in the above Answer.

[Title of District Court and Cause—No. 4235.]

NOTICE AND MOTION FOR SUMMARY
JUDGMENT

To: Viola Juanita Hatchitt, Plaintiff, and John W. Preston, Oliver O. Smith, David D. Sallee and Robert A. Smith, her attorneys, 712 Rowan Building, 458 South Spring Street, Los Angeles 13, California.

NOTICE

You and Each of You Will Please Take Notice that on the 16th day of April, 1945, at 10:00 o'clock A.M. thereof, or as soon thereafter as counsel may be heard, before the Honorable J. F. T. O'Connor, Judge of the District Court in his courtroom, United States Post Office and Courthouse Building, Los Angeles, California, defendant will move the Court that Summary Judgment be entered against the plaintiff and in favor of defendant in accordance with Rule 56 Federal Rules of Civil Procedure.

MOTION

Comes Now defendant United States of America, by Eugene D. Williams, James A. Murray and Marvin J. Sonosky, its attorneys, and moves this Honorable [32] Court for its Order entering its judgment dismissing the Complaint herein, on the ground that the parties to this action are bound and concluded as to the subject matter of this action by the decree entered August 22, 1938, in the case entitled *Viola Juanita Hatchitt v. United States*, No. Eq. 1209-Y in this court.

This motion will be based upon the records, pleadings and files of the above-entitled action and upon the records, pleadings and files and proceedings in the case of *St. Marie v. United States*, No. Eq. 918-Y and *Viola Juanita Hatchitt v. United States*, No. Eq. 1209-Y, and filed in this District Court.

Dated: This 5th day of April, 1945.

EUGENE D. WILLIAMS

Special Assistant to the
Attorney General

JAMES A. MURRAY

Special Assistant to the
Attorney General

MARVIN J. SONOSKY

Special Assistant to the
Attorney General
Attorneys for Defendant
United States of America

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 56, Federal Rules of Civil Procedure.

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381; 84 Law. Ed. 1263.

Estate of Harrington, 147 Cal. 124; 81 Pac. 546.

Borges v. Hellman, 29 Cal. App. 144; 154 Pac. 1075.

Bank of America National Trust & Savings As-

sociation v. McLaughlin, 22 Cal. 2d 411; 71 Pac. 2d 291; 72 Pac. 554.

Phillips v. Patterson, 34 Cal. App. 2d 481; 93 Pac. 2d 807.

[Endorsed]: Filed April 5, 1945. [33]

Defendant United States of America filed a like motion on like grounds in Action No. 4236.

[Title of District Court and Cause—No. 4325.]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff in the above entitled cause and for opposition to motion of defendant for summary judgment herein, specifies as follows:

I.

That on the 14th day of May, 1945, this Court duly gave and caused to be entered a final judgment and decree in the case of Lee Arenas vs. United States of America, action No. 1321 O'C Civil, in which the Court determined that it was the duty of the Secretary of the Department of interior now, and ever since March 2, 1917, has been, to allot in severalty the lands belonging to the Palm Springs or Agua Caliente Band of Mission Indians to the eligible members of said Band.

II.

That pursuant to the provisions of said Act of March 2, 1917, the Secretary of the Department of Interior did on June 21, 1923, and [35] again on May 9, 1927, allot the lands described in the complaint herein to this plaintiff.

III.

That the only interest of the Secretary of the Department of Interior in the matter of allotments is to ascertain and follow the policy provided by the Congress of the United States for the making of such allotments.

The judgment in the action of Juana S. Hatchitt, complainant, vs. United States of America, Trustee, Defendant, Equity No. 1208-C, only determines the rule of policy contended for by the Secretary of the Department of Interior at the time of the rendition thereof.

By the judgment in the case of Lee Arenas vs. United States of America, *supra*, that policy has been declared illegal and the duty to issue a trust patent to the plaintiff herein, but for the said judgment in action No. 1208-C, has been declared.

IV.

The plaintiff hereby makes the judgment entered in the case of Lee Arenas vs. United States of America, *supra*, a part of this opposition and pleads herein that the defendant is estopped to rely upon the doctrine of *res judicata* as an excuse for

the failure to issue a trust patent to plaintiff herein.

Wherefore, plaintiff prays that said motion for summary judgment herein be denied.

Respectfully submitted,

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON.

Dated: May 21, 1945.

[Endorsed]: Filed May 21, 1945. [36]

Plaintiff in Action No. 4236 filed an Opposition to the Motion for Summary Judgment in said action upon the same grounds as specified above.

[Title of Court and Causes—Nos. 4235-4236.]

ORDER OF COURT GRANTING MOTION OF
THE GOVERNMENT, FILED APRIL 5TH,
1945, FOR A SUMMARY JUDGMENT.

Viola Juanita Hatchitt, a minor, by Juana S. Hatchitt, prochein ami, in case No. 1209-Y Eq., filed her action in this court for a trust allotment patent to lands of the Agua Caliente or Palm Springs Band of Mission Indians of California; and Juana Saturnino Hatchitt, in case No. 1208-Y. Eq., likewise filed her action in this court for a

trust allotment patent to lands of the Agua Caliente or Palm Springs Band of Mission Indians of California. Pursuant to stipulation of the parties thereto, these two cases were consolidated for hearing and tried with the case of *Genevieve P. St. Marie v. United States*, No. 918-Y. Eq., in this court, before the Hon. Leon R. Yankwich, Judge, who, after hearing, argument and briefs of counsel, rendered his Opinion in favor of the Government, pursuant to [38] which Findings of Fact and Conclusions of Law and a Final Decree were duly filed and entered decreeing that the complainant take nothing by her action. Separate Findings of Fact and Conclusions of Law and Final Decrees were entered in 1208-Y. Eq. and 1209-Y. Eq., on August 22nd, 1938, likewise decreeing that the complainants take nothing by their actions 24 F. Supp. 237. These three cases were appealed to the Circuit Court of Appeals for the Ninth Circuit and the judgments of Judge Yankwich were affirmed. 108 F. (2d) 876, C.C.A. 9, 1940. The Supreme Court of the United States denied certiorari for the reason that the petition therefor was filed too late. 311 U.S. 652.

Viola Juanita Hatchitt in 4235 O'C. Civil, and Juana Saturnino Hatchitt in 4236 O'C. Civil, subsequently filed new suits in this court for the same relief claimed in their prior actions in which the decrees have long since become final. In these two latter suits the Government has filed motions for summary judgments relying upon the doctrine of *res judicata*.

In the case of *Lee Arenas v. United States*, No. 1301 O'C. Civil, tried before me, this court, after a trial of the issues involving a similar, if not an identical, state of facts as existed in the *St. Marie* case, *supra*, but in which another Indian was involved and in which the doctrine of *res judicata* did not come into play, came to a different conclusion as to the construction to be placed upon certain federal statutes from that arrived at by the Hon. Leon R. Yankwich, Judge, in the *St. Marie* case, and found in favor of the plaintiff *Lee Arenas* and against the *United States*.

At the argument on the motion of the Government for a summary judgment in each of the cases Nos. 4235 O'C. Civil and 4236 O'C. Civil, counsel for the *Hatchitts*, relying upon the decision in the *Lee Arenas* case, took the position that they should not be bound by the previous ruling of Judge [39] Yankwich in their former cases for the reasons (1) that the doctrine of *res judicata* is not applicable to them or that they come within the exceptions thereto; and (2) that the Attorney General of the *United States* had no authority to interpose the defense of *res judicata*. These positions seem to the court to be untenable.

As to point one, it is alleged by counsel for the plaintiffs that the former judgments, each pleaded by the Government as *res judicata*, were void or at least contrary to law in that each of the findings of fact upon which the judgments were based was erroneous by reason of the construction of the stat-

utes involved or that the findings of fact upon which the judgments were rendered contained in themselves conclusions of law.

Granted that the Bill of Review can still be available in the Federal District court in exceptional cases to vacate or correct final judgments as an exception to the doctrine of *res judicata*, the court is of the opinion that such a remedy is not available under these facts where the judgments are regular on their face. In treating the subject of vacating judgments that have become final *The Cyclopedia of Federal Procedure* (2d Ed.) vol. 8, p. 367, has this to say:

“It has been held that a subsequent decision in another case by the Supreme Court, based on principles which, if applied, would have produced a different result in the original suit, does not show error apparent in the original decree (*Scotten v. Littlefield*, 235 U.S. 407; 59 L.Ed. 289; 35 Sup. Ct. 125).”

See also 22 Fed. Rep. (2d) 143, *Swift v. Parmenter, et al.*, (C. C. A. 8, 1927) setting forth the principles of law as a predicate for a Bill of Review.

The court is of the opinion that the doctrine of *res judicata*, by reason of the final judgments of Judge Yankwich in Nos. 1208-Y. and 1209-Y., both in equity, which were regular on their face, is clearly applicable and that the motions of the Government for summary judgments in these two cases now [40] before the Court must be granted.

Chicot County Drainage District v. Baxter State Bank, et al., 308 U.S. 371, is conclusive authority, in the Court's opinion, for this court's position that *res judicata* is applicable to a judgment based upon a statute which has subsequently been declared unconstitutional in another case; and, *a fortiori*, it is just as binding in a judgment where a court has misinterpreted a statute.

As to point two, *United States v. San Jacinto Tin Company*, 125 U.S. 273; 31 Law Ed. 747, and *United States v. Minor*, 114 U.S. 241; 29 Law Ed. 113, are authority for the proposition of law that the same remedies are available to the Government as a private citizen, and the Court concludes that this plea of *res judicata* is a proper plea to be interposed by the defendant on these motions.

If the decision in the Lee Arenas case should be ultimately sustained in the upper courts and it should then be determined that these two plaintiffs have suffered an injustice by an erroneous interpretation of federal statutes resulting in the entry of final decrees which have long since become final, these final decrees would nevertheless still be binding, and the plaintiffs' remedy would be by an appeal to the Legislature and not to the courts. The doctrine of *res judicata* is a salutary one and a bulwark in the system of American and English jurisprudence of long standing and its integrity should not be undermined or whittled away. It is necessary that there should be a finality to litigation.

Counsel for the Government will prepare a judg-

ment of dismissal in each of the foregoing cases, in accordance with this order, for the signature of the court within ten days, after submitting same to counsel for the plaintiffs for approval as to form.

Dated: Los Angeles, Calif., May 29th, 1945.

(Signed) J. F. T. O'CONNOR,
U. S. Dist. Judge.

[Endorsed]: Filed May 29, 1945. [41]

In the District Court of the United States in and
for the Southern District of California, Central Division.

No. 4235 O'C.—Civil

VIOLA JUANITA HATCHITT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on to be heard before the Honorable J. F. T. O'Connor, United States District Judge, Southern District of California, on the 21st day of May, 1945, on the motion of defendant for summary judgment of dismissal; and

John W. Preston, Oliver O. Clark and David D.

Sallee, Esqs., appearing as counsel for plaintiff, and James A. Murray, Special Assistant to the Attorney General, appearing as counsel for defendant, and the matter having been fully argued by counsel for the respective parties and the motion submitted to the Court; and

It appearing to the Court that all issues raised by the complaint herein have been heretofore determined adversely to the plaintiff by the decree of this Court in the case of Viola J. Hatchitt, minor, by Juana S. Hatchitt, prochein ami, v. United States of America, No. 1209-Y Eq., which decree was affirmed by the Circuit Court of Appeals in and for the Ninth Circuit in the case of St. Marie v. United States of America, reported in 108 F. 2d 876, certiorari denied 311 U. S. 652, petition filed out of [42] time; and

It further appearing that the decree in action No. 1209-Y Eq. became and is a final judgment and is binding and conclusive and res judicata as to all matters of law and fact raised by the complaint herein;

It Is Ordered, Adjudged and Decreed that the motion of defendant for summary judgment of dismissal be granted and the plaintiff take nothing by her complaint on file herein.

Dated: This 1st day of June, 1945.

(Signed) J. F. T. O'CONNOR,
Judge.

Approved as to form.

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Plaintiff.

Presented by:

EUGENE D. WILLIAMS,
JAMES A. MURRAY,
MARVIN J. SONOSKY,
Special Assistants to the At-
torney General.

By JAMES A. MURRAY,
Attorneys for Defendant. [43]

At a stated term, to-wit: The February Term, A.D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 4th day of June, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable: J. F. T. O'Connor,
District Judge.

[Title of Court and Causes—Nos. 4235-4236.]

The above-entitled causes coming before the Court for further proceedings at this time; James Murray, Esq., Special Asst. to the Attorney General,

appearing for the Government; and John W. Preston, Esq., appearing for the plaintiffs; C. W. McClain, Court Reporter, being present and reporting the proceedings: Attorney Preston, upon being informed that judgments have been entered in these two cases, moves that said judgments be vacated and not re-entered until the judgment in the case of Lee Arenas vs. United States of America, No. 1321-O'C., Civil, becomes final, or that said plaintiffs be permitted to dismiss their actions at this time. Attorney Murray, having thereupon stated that plaintiffs' motions come too late, and that the summary judgments of dismissal should stand, it is by the Court ordered that the oral motion of Attorney Preston, made at this time, be taken under submission on briefs to be filed 5 x 5 x 2. [44]

Thereafter and on the 11th day of June, 1945, the Court vacated said order and allowed plaintiffs five days within which to file amendments or objections in re the motions for summary judgment in said causes.

Whereupon on the 19th day of June, 1945, plaintiffs filed an Amended Opposition to the Motion for Summary Judgment in each of said action, as follows, to wit:

[Title of Court and Cause in the two consolidated causes.]

Plaintiff hereby repeats the allegations of the opposition to motion for summary judgment on file

herein and, in addition thereto, specifies the following:

I.

That the relation between the United States of America and plaintiff is that of guardian and ward.

II.

That the situation of plaintiff and the said Lee Arenas respecting their right to allotments are identical save and except the existence of the judgment pleaded in defendant's answer. That is to say, that this plaintiff received an allotment at the same time and in the same manner as did Lee Arenas.

III.

That if and when the Arenas judgment becomes final, it will be the bounden duty of the United States of America to refrain from urging the plea of *res judicata* herein or doing any other act that would defeat plaintiff's right to her allotment.

Wherefore, plaintiff urges that action on defendant's plea at this time is premature and that judgment should be withheld until the aforesaid Arenas judgment becomes final.

Dated this 19th day of June, 1945.

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Plaintiff. [45]

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 4236-O'C.—Civil

JUANA SATURNINO HATCHITT,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled cause came on to be heard before the Honorable J. F. T. O'Connor, United States District Judge, Southern District of California, on the 21st day of May, 1945, on the motion of defendant for summary judgment of dismissal; and

John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., appearing as counsel for plaintiff, and James A. Murray, Special Assistant to the Attorney General, appearing as counsel for defendant, and the matter having been fully argued by counsel for the respective parties and the motion submitted to the Court; and

It appearing to the Court that all issues raised by the complaint herein have been heretofore determined adversely to the plaintiff by the decree of this Court in the case of Juana S. Hatchitt vs. United States of America, No. 1208-Y Eq., which decree was affirmed by the Circuit Court of Appeals in and for the Ninth Circuit in the case of St.

Marie vs. United States of America, reported in 108 F. 2d 876, certiorari denied 311 U. S. 652, petition filed out [46] of time; and

It further appearing that the decree in action No. 1208-Y Eq. became and is a final judgment and is binding and conclusive and res judicata as to all matters of law and fact raised by the complaint, herein;

It Is Ordered, Adjudged and Deereed that the motion of defendant for summary judgment of dismissal be and the same is hereby granted and the plaintiff to take nothing by her complaint on file herein.

Dated: This 20th day of June, 1945.

J. F. T. O'CONNOR,

Judge.

Approved as to form:

JOHN W. PRESTON, OLIVER O. CLARK,

DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,

Presented by:

EUGENE D. WILLIAMS,

JAMES A. MURRAY,

MARVIN J. SONOSKY,

Special Assistants to the At-
torney General.

By JAMES A. MURRAY,

Attorneys for Defendant.

[Endorsed]: Filed June 20, 1945. [47]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 4235-O'C.—Civil

VIOLA JUANITA HATCHITT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on to be heard before the Honorable J. F. T. O'Connor, United States District Judge, Southern District of California, on the 21st day of May, 1945, on the motion of defendant for summary judgment of dismissal; and

John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., appearing as counsel for plaintiff, and James A. Murray, Special Assistant to the Attorney General, appearing as counsel for defendant, and the matter having been fully argued by counsel for the respective parties and the motion submitted to the Court; and

It appearing to the Court that all issues raised by the complaint herein have been heretofore determined adversely to the plaintiff by the decree of this Court in the case of *Viola J. Hatchitt, minor, by Juana S. Hatchitt, prochein ami, vs. United States of America*, No. 1209-Y Eq., which decree was affirmed by the Circuit Court of Appeals in

and for the Ninth Circuit in the case of *St. Marie vs. United States of America*, reported [48] in 108 F. 2d 876, certiorari denied 311 U. S. 652, petition filed out of time; and

It further appearing that the decree in action No. 1209-Y Eq. became and is a final judgment and is binding and conclusive and *res judicata* as to all matters of law and fact raised by the complaint herein;

It Is Ordered, Adjudged and Decreed that the motion of defendant for summary judgment of dismissal be and the same is hereby granted and the plaintiff to take nothing by her complaint on file herein.

Dated: This 20th day of June, 1945.

(Signed) J. F. T. O'CONNOR,
Judge.

Approved as to form:

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Plaintiff.

Presented by:

EUGENE D. WILLIAMS,
JAMES A. MURRAY,
MARVIN J. SONOSKY,

Special Assistants to the At-
torney General.

By JAMES A. MURRAY,
Attorneys for Defendant.

[Endorsed]: Filed June 20, 1945. [49]

[Title of Court and Cause—No. 4235.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

You Will Please Take Notice that the plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment therein entered in the said District Court of the United States in and for the Southern District of California, Central Division, on the 20th day of June, 1945, in favor of the defendant and against the plaintiff and from the whole thereof.

Dated this 29th day of August, 1945.

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Plaintiff.

[Endorsed]: Filed September 11, 1945. [50]

[Title of Court and Cause—No. 4236.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

You Will Please Take Notice that the plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment therein entered in the said District Court of the United States in and for the Southern District of California, Central Division, on the 20th day of

June, 1945, in favor of the defendant and against the plaintiff and from the whole thereof.

Dated this 29th day of August, 1945.

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Plaintiff.

[Endorsed]: Filed September 11, 1945. [51]

On said 11th day of September, 1945, plaintiffs in each of the two above mentioned causes duly filed with the Clerk of the District Court in which said actions were pending, good and sufficient bonds upon appeal as required by Rule No. 73(c), Rules of Civil Procedure. [52]

[Title of Court and Cause—No. 4235.]

EXTENSION OF TIME FOR DOCKETING
AND RECORD ON APPEAL

(F.R.C.P. 73(g))

Good cause appearing therefor, It Is Hereby Ordered that plaintiff and appellant may have to and including December 5, 1945, within which to docket its appeal and the record on appeal in the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 12th day of October, 1945.

J. F. T. O'CONNOR

Judge

Presented by:

JOHN W. PRESTON

OLIVER O. CLARK

DAVID D. SALLEE

ROBERT A. SMITH

By JOHN W. PRESTON

Attorneys for Appellant [53]

[Title of Court and Cause—No. 4236.]

EXTENSION OF TIME FOR DOCKETING
AND RECORD ON APPEAL

(F.R.C.P. 73(g))

Good cause appearing therefor, It Is Hereby Ordered that plaintiff and appellant may have to and including December 5, 1945, within which to docket its appeal and the record on appeal in the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 12th day of October, 1945.

J. F. T. O'CONNOR

Judge

Presented by:

JOHN W. PRESTON

OLIVER O. CLARK

DAVID D. SALLEE

ROBERT A. SMITH

By JOHN W. PRESTON

Attorneys for Plaintiff and
Appellant [54]

[Title of Court and Cause—Nos. 4235-4236.]

STIPULATION CONSOLIDATING
APPEALS AND RECORD

Whereas, the two above entitled causes arose from the same transaction and were tried together and submitted for decision on the same evidence, and

Whereas, the judgment roll, evidence and proceedings taken in the case of Lee Arenas vs. United States of America, action No. 1321 O'C Civil, in the above entitled Court, were also received in evidence as a part of the proceedings on the trial of each of said causes, and

Whereas, a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit, has been filed in each of the three above [55] mentioned causes.

Now, Therefore, the respective parties to said appeals do hereby stipulate as follows:

(1) That the appeals in the cases of Viola Juanita Hatchitt vs. United States of America, No. 4235 O'C Civil, and Juana Saturnino Hatchitt vs. United States of America, No. 4236 O'C Civil, may be heard upon the same record and that an order of the trial court may be made to this effect.

(2) That the record on appeal in the case of Lee Arenas v. United States of America, No. 1321 O'C Civil, when completed, may be considered a part of the record on appeal in the other two causes in the same manner and to the same extent as it

set up in extenso in the record therein and that an order of the trial court may be made to this effect.

Dated this 1st day of December, 1945.

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Plaintiff.

EUGENE D. WILLIAMS, JAMES A.
MURRAY, MARVIN J. SONOSKY,

Special Assistants to the Attorney General

By JAMES A. MURRAY,
Attorneys for Defendant United States of
America [56]

[Title of Court and Causes—Nos. 4235-4236.]

ORDER CONSOLIDATING APPEALS AND
DIRECTING PREPARATION OF THE
RECORD THEREON

Good cause appearing therefor, and upon stipulation of the parties thereto,

It Is Hereby Ordered:

1. That the appeals to the Circuit Court of Appeals for the Ninth Circuit in the above entitled actions be consolidated for hearing and that the record for such hearing be prepared in a single transcript.

2. That the record on appeal in the case of Lee Arenas vs. United States of America, being action No. 1321 O'C Civil, in the above entitled Court, now in the course of preparation, may be considered a part of the record on these appeals by reference and without the [57] necessity of reproducing the same herein.

Dated this 3rd day of September, 1945.

J. F. T. O'CONNOR

Judge [58]

[Title of Court and Causes—Nos. 4235-4236.]

STIPULATION AS TO AGREED STATEMENT OF THE CASE FOR USE ON APPEAL

The foregoing statement is hereby agreed to and approved as a full and correct "Statement of the Case" to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the provisions of Rule 76 of the Rules of Civil Procedure.

It is further stipulated and agreed that said Agreed Statement shall constitute and be used as the record on appeal in each of said two named cases, and that, subject to the approval of said Appellate Court, said two cases may be consolidated on said appeal, and be heard and decided by said Appellate Court on the one record [59] on appeal.

Dated this 3rd day of December, 1945.

EUGENE D. WILLIAMS
JAMES A. MURRAY
MARVIN J. SONOSKY

By JAMES A. MURRAY
Attorneys for Defendant
United States of America

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON.

The foregoing Statement of the Case is hereby approved.

Dated this 3rd day of December, 1945.

J. F. T. O'CONNOR
Judge [60]

[Title of Court and Causes—Nos. 4235-4236.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 60, inclusive, contain the original Agreed Statement of the Case for use on Appeal, under Rule 76 of the Rules of Civil Procedure which constitutes the record on appeals to

the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$1.70 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 4th day of December, 1945.

[Seal] EDMUND L. SMITH,
Clerk

By THEODORE HOCKE
Chief Deputy Clerk

[Endorsed]: No. 11205. United States Circuit Court of Appeals for the Ninth Circuit. Viola Juanita Hatchitt, Appellant, vs. United States of America, Appellee. Juana Saturnino Hatchitt, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed December 6, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11205

VIOLA JUANITA HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUANA SATURNINO HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' STATEMENT OF POINTS TO
BE RELIED UPON AND DESIGNATION
OF THE RECORD TO BE PRINTED

Comes now the appellant in each of the above entitled causes and hereby designates the following points upon which they will rely upon in each of the appeals herein:

I

That the District Court erred in not sustaining plaintiff's opposition to the motion for summary judgment on the ground that the United States of America, being the guardian of said appellants and each of them, is estopped to rely upon the doctrine *res judicata* as to them.

II

That the District Court erred in not granting appellants' motion for a stay of proceedings until the cause pending in action No. 1321, entitled Lee Arenas vs. United States of America, was terminated by final judgment.

Appellants further state that they believe and consider that the entire Agreed Statement of the Case certified by the trial court is necessary for the consideration of the points upon which said Appellants intend to rely in this Court, and they desire to have said entire Agreed Statement printed herein.

Dated this 3rd day of December, 1945.

JOHN W. PRESTON, OLIVER O. CLARK,
DAVID D. SALLEE, ROBERT A. SMITH.

By JOHN W. PRESTON,
Attorneys for Appellants

Received copy of the above and foregoing Statement and Designation, this 3rd day of December, 1945.

EUGENE D. WILLIAMS, JAMES A.
MURRAY, MARVIN J. SONOSKY,

By JAMES A. MURRAY
Attorneys for Appellee

[Endorsed]: Filed December 6, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

VERIFIED APPLICATION FOR ORDER FOR
CONSOLIDATION OF APPEALS AND
CONSENT OF APPELLEE THERETO

United States of America,
State of California,
County of Los Angeles—ss.

John W. Preston, being first duly sworn, on oath deposes and says:

That he is one of the attorneys and counsel for the Appellants in the above entitled two causes; that he was one of the attorneys for said Appellants, and each of them, in the trial court, namely, In the District Court of the United States, in and for the Southern District of California, Central Division, and represented said Appellants (as plaintiffs in said trial court) during all of the proceedings in said court.

Pursuant to an order of said trial court, said two causes were consolidated and tried together therein, and the evidence introduced was applicable to and considered by said court in connection with each and both of said two causes.

In each of the above-entitled causes the United States of America was Defendant, and these Appellants were, respectively, Plaintiffs therein. Each of said plaintiffs is a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, and each of said actions was brought for the following purposes, to wit: For adjudications: (a) that each is a

duly enrolled and recognized member of said Band of Indians; (b) that each was allotted and reallocated in severalty the lands described in her complaint and that she is entitled to an allotment trust patent thereto; (c) that the trust period of twenty-five years provided in the Mission Indian Act shall begin to run from the 21st day of June, 1923; and (d) that as to each a copy of the decree of the Court be certified to the Secretary of the Interior of the United States of America.

The issues were the same in each of the two causes. The facts found and the conclusions arrived at by the trial court as to the issues involved were the same in each of said two causes, and the final judgments for defendant made and entered by the trial court were the same in each of said causes.

The certified record on appeal herein is in the form of an Agreed Statement of the Case under Rule 76 of the Rules of Civil Procedure, and relates to and covers all of said two causes. The Stipulation concerning said Agreed Statement (with the approval of the trial Judge) provides, among other things, as follows:

“It is further stipulated and agreed that said agreed statement shall constitute and be used as the record on appeal in each of said two named cases, and that, subject to the approval of said Appellate Court, said two cases may be consolidated on said appeal, and be heard and decided by said Appellate Court on the one record on appeal.”

Wherefore, affiant, for and on behalf of said

Appellants, hereby applies for and requests an order of this Court to the effect that said two causes shall be consolidated for hearing on this appeal, and that said appeals in said two causes shall be heard and decided upon the one record which has been filed herein.

(Signed) JOHN W. PRESTON

Subscribed and sworn to before me this 1st day of December, 1945.

[Seal] RETTA C. HARRISON,
Notary Public in and for the County and State.

It Is So Ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

Received copy of the above and foregoing affidavit and application, this 3rd day of December, 1945, and the Appellee hereby consents to the making and entry of the order therein requested.

EUGENE D. WILLIAMS

JAMES A. MURRAY

MARVIN J. SONOSKY

By JAMES A. MURRAY

Attorneys for Appellee

[Endorsed]: Filed December 6, 1945. Paul P. O'Brien, Clerk.

1971

1972

United States Circuit Court of Appeals
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES OF AMERICA.

Defendant.

UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES OF AMERICA.

Defendant.

APPELLANTS' OPENING BRIEF.

James M. Montgomery
111 South Spring Street, Los Angeles 12,
California 90012
David T. Souter
Samuel J. Smith

Submitted and argued before the Court on August 14,

1971.

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No. 11205

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

VIOLA JUANITA HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

JUANA SATURNINO HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANTS' OPENING BRIEF.

I.

Jurisdictional Statement.

Two appeals are involved herein. These two appeals are from summary judgments rendered in favor of the defendant and against the respective plaintiffs in two actions entitled, "*Viola Juanita Hatchitt v. United States of America*," No. 4235 O'C Civil, and "*Juana Saturnino Hatchitt v. United States of America*," No. 4236 O'C Civil, in the District Court of the United States for the

Southern District of California, Central Division. [Tr. pp. 45-47, 50-51, 52-53.] These two appeals have been consolidated by stipulation of the parties [Tr. pp. 57-58] and by order of the Court [Tr. pp. 58-59] because the same relief was sought in each of the above-mentioned actions which were tried together and submitted on the same evidence in the court below. [Tr. p. 57.]

Each of the appellants is a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California. [Tr. pp. 3, 10.] In each of the above entitled actions the plaintiff therein sought a judgment adjudging and decreeing: (a) that she is a duly enrolled and recognized member of the Palm Springs Band of Mission Indians of California; and (b) that on June 21, 1923, the United States of America allotted certain lands to each of said plaintiffs, as described in their respective complaints, and that each plaintiff is entitled to an allotment trust patent to the lands described in her complaint from the United States of America. Appellants also prayed for other and general relief.

The District Court had jurisdiction to grant the relief prayed for under Section 345 of Title 25, U. S. C. A. (31 Stat. 760) which, in so far as pertinent, provides as follows:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any

Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases."

This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A., Section 225) and under Section 345 of Title 25, U. S. C. A., *supra*.

The pleadings necessary to show the existence of the jurisdictions are the complaint [Tr. pp. 2-9] and the answer thereto [Tr. pp. 10-35].

The District Court rendered one opinion, designated "Order of Court Granting Motion of The Government . . . For a Summary Judgment" applying to both of said cases [Tr. pp. 40-45] and judgment in each of said cases [Tr. pp. 45-47, 50-51, 52-53].

II.

Statement of the Case.

(The two complaints will be hereinafter referred to as "the complaint," and the two judgments as "the judgment.")

THE COMPLAINT.

Appellants' complaint, briefly summarized, alleges:

1. That appellants are citizens of the United States and of the State of California, are of Indian blood and descent, and are duly enrolled and recognized members of the Palm Springs Band of Mission Indians of California.

2. That the Secretary of the Interior, acting under authority of certain Acts of Congress did, on or about June 7, 1921, conclude that the Mission Indians of California were sufficiently advanced in civilization to be capable of owning and managing land in severalty; that shortly thereafter the Secretary appointed H. E. Wadsworth as Allotting Agent at Large for the Mission Indian Reservations of California with authority to make allotments of lands in severalty to the Mission Indians; and that, pursuant to the authority granted him, said Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs Reservation of Mission Indians of California in order that allotments in severalty should be made by him to the members of said Band in accordance with the Statutes of the United States.

3. That on June 21, 1923, the said Allotting Agent allotted to appellants the lands described in the complaint, and thereafter issued and delivered to them certificates of allotment to said lands under which appellants became

entitled to allotment trust patents and to the sole and exclusive possession of said lands.

4. That on October 26, 1923, said Allotting Agent, acting by authority of the Secretary of the Interior, stated and represented to appellants that the issuance and delivery of said certificates of allotment entitled them to enter upon and take possession of the lands so allotted, and that said certificates would be evidence of their right to possess, hold and improve said lands pending the issuance of trust patents thereto to appellants, and that believing and relying upon said certificates, statements and representations appellants improved said lands by erecting thereon permanent buildings and structures suitable for residential and business purposes in excess of \$25,000 by each of the appellants, and that they would not have made said improvements but for the conduct, statements and representations of the Secretary of the Interior and said Allotting Agent.

5. That in 1927 the Secretary of the Interior attempted to withdraw the allotments made in 1923, directed the Allotting Agent to make reallocations, and the lands previously allotted to appellants in 1923 were reallocated to them in 1927, and similar certificates of allotment were issued by the Allotting Agent and delivered to appellants.

6. That as the result of the acts and conduct of the Secretary of the Interior and the Allotting Agent appellants became and at all times after June 21, 1923, were and are the equitable owners of the lands so allotted and the improvements placed thereon and entitled to allotment trust patents thereto.

7. That by reason of the Acts of Congress and the foregoing acts, conduct, etc., it became, was and is the

mandatory duty of the Secretary of the Interior at all times since June 21, 1923, to issue to appellants allotment trust patents to the lands allotted to them.

8. That by reason of the Acts of Congress and the acts, conduct, proceedings, statements and representations of the Secretary of the Interior and of said Allotting Agent the United States is estopped to question or deny appellants' equitable title to said lands or their right to allotment trust patents thereto or their right to the exclusive possession, use and enjoyment thereof. [Tr. pp. 2-9.] And appellants prayed for the relief hereinabove mentioned and set forth.

THE ANSWER.

The United States filed an answer to the complaint, consisting of three designated "Defenses." The First Defense is an answer to the allegations of the complaint, some of which are admitted and others denied. The Second Defense is largely an historical and detailed statement concerning the appointment of H. E. Wadsworth as Allotting Agent for the Mission Indian Reservations of California and of what was done by him and the Secretary of the Interior in respect to the allotments made by said Allotting Agent in 1923 and the reallocations made in 1927, and said Second Defense closed with the statement that on December 14, 1944, the Secretary of the Interior disapproved the Schedule prepared and filed by said Allotting Agent in the year 1927. In view of the fact that the judgment of the District Court is based entirely upon the Third Defense of the Answer, it is unnecessary to elaborate upon the First and Second Defenses set up in the Answer.

In its Third Defense the United States pleaded, as a bar to appellants' respective actions, the judgment and decree of the District Court of the United States for the Southern District of California, Central Division, in the case of *Viola J. Hatchitt v. United States of America*, No. Eq. 1209-M (later numbered Eq. 1209-Y), which was consolidated for the trial in an action of similar nature entitled *Genevieve F. St. Marie v. United States of America*, No. Eq. 918-Y, and sixteen other actions similar in character, all of which cases are commonly known as the *St. Marie Cases*. (See *St. Marie v. United States*, 24 F. Supp. 237, affirmed 108 F. (2d) 876, certiorari denied by Supreme Court because petition therefor filed out of time, 311 U. S. 652.) The United States pleaded in said Third Defense that the judgments in the *St. Marie* and consolidated cases, including those of appellants, have become final, binding and conclusive upon the parties to the present actions and the subject matter thereof and are *res judicata* as to all matters alleged in the complaint. [Tr. pp. 18-35.]

Immediately upon filing its answer the United States filed "Notice and Motion for Summary Judgment" that appellants' complaints be dismissed on the ground that the parties to this action are bound and concluded as to the subject matter thereof by the judgment and decree in the above mentioned and titled former actions. [Tr. pp. 36-38.] Appellants thereupon filed their "Opposition to Motion for Summary Judgment" [Tr. pp. 38-40], following which the trial court heard said motion and opposition thereto and thereupon made and filed its Order granting motion of the Government for summary judgment [Tr. pp. 40-45], and thereafter made and entered its judgment accordingly. [Tr. pp. 45-46, 50-51, 52-53.]

III.

Holding of the Court.

The judgment of the Court below, in so far as pertinent, is as follows:

“It appearing to the Court that all issues raised by the complaint herein have been heretofore determined adversely to the plaintiff by the decree of this Court in the case of Viola J. Hatchitt, minor, by Juana S. Hatchitt, *prochein ami*, v. United States of America, No. 1209-Y Eq., which decree was affirmed by the Circuit Court of Appeals in and for the Ninth Circuit in the case of St. Marie v. United States of America, reported in 108 F. 2d 876, certiorari denied 311 U. S. 652, petition filed out of time; and

“It further appearing that the decree in action No. 1209-Y Eq. became and is a final judgment and is binding and conclusive and *res judicata* as to all matters of law and fact raised by the complaint herein;

“It Is Ordered, Adjudged and Decreed that the motion of defendant for summary judgment of dismissal be granted and the plaintiff take nothing by her complaint on file herein.”

IV.

Judgment in the Former Case Pleaded as Res
Judicata in Present Case.

The judgment of the District Court in the former case, pleaded as *res judicata*, provides:

“It Is Ordered, Adjudged and Decreed that the complainant take nothing by her action; and

“It Is further Ordered that neither party recover costs of suit.” [Tr. p. 35.]

Inasmuch as the former judgment does not disclose the issues, claims, and demands there involved, reference must be made to other parts of the record in that case in order to determine what was decided by the judgment therein.

In addition to the judgment, the record pleaded in the Answer herein consists of the “Bill of Complaint” [Tr. pp. 21-27] and the “Answer to Bill of Complaint” [Tr. pp. 28-34].

Said Bill of Complaint briefly summarized, alleged: that appellants were of Indian blood and descent and were duly enrolled and recognized members of the Palm Springs Band of Mission Indians of California; that pursuant to certain Acts of Congress the Secretary of the Interior, on June 7, 1931, concluded that the Mission Indians were so far advanced in civilization as to be capable of owning and managing lands in severalty; that thereafter said Secretary caused to be made allotments of land in severalty to such of said Indians, including appellants, as made selections of land, which the Secretary did thereafter allot or cause to be allotted to them by causing the same to be recorded upon the official schedule of allotment and by issuing to them certificates of allotment

to the lands so selected on May 9, 1927. [Tr. pp. 21-22.] The Bill of Complaint further alleged that, pursuant to Acts of Congress, the Secretary of the Interior, on June 7, 1921, appointed H. E. Wadsworth a Special United States Allotting Agent at Large for the Mission Indian Reservations of California, effective July 1, 1921, who accepted and qualified as such; that thereafter said Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs Reservation of the Mission Indians of California; and that thereafter on May 7, 1927, acting under the direction and authority of said Secretary and the Statutes of the United States, said Allotting Agent allotted the lands involved to appellants and that under and by virtue of such allotment the Allotting Agent issued a certificate to each of the complainants under which she became entitled to the sole use and benefit of the lands described therein; that appellant many times made requests upon proper agents of the United States for an allotment trust patent for the lands selected and described in the certificate to which she was entitled under designated Acts of Congress, but that such patent had not been issued; and that she has a vested right to said lands. The Bill of Complaint prayed, in so far as necessary to state here:

“That it be adjudged, ordered and decreed by this Court:

“(a) That the United States allotted to the complainant on May 9, 1927, for her sole use and benefit, the lands above described in this her bill of complaint.

“(b) That the complainant is entitled to an Allotment Trust Patent to the said lands from the United States of America. . . .”

and for other and general relief. [Tr. pp. 26-27.]

The United States filed its answer to said Bill of Complaint, denying therein that, on May 9, 1927, or at any other time, the Secretary of the Interior or H. E. Wadsworth, Allotting Agent, or any other person, allotted to complainant the lands described in the complaint, and also denying that the Secretary or said Allotting Agent issued a certificate to complainant which entitled her to the use of said lands. The answer admitted: that H. E. Wadsworth was appointed as Allotting Agent for the Mission Indian Reservations and that he surveyed and classified the lands of the Palm Springs Mission Indian Reservation [Tr. p. 31]; that said Agent was authorized and directed to prepare a tentative allotment schedule for the Palm Springs Band of Mission Indians [Tr. p. 31]; that in 1923 said Agent prepared a tentative allotment schedule which the Secretary refused to approve; that in 1927 the Allotting Agent was directed by the Secretary to prepare another schedule for those members of said Palm Springs Band who desired allotments, that said schedule was prepared and certificates of selection were issued by the Allotting Agent; that the Secretary refused and refuses to approve said tentative allotments made in 1927, and refused and refuses to issue trust patents to the lands selected. [Tr. pp. 31, 32.]

It is apparent from the pleadings in the former case that the only issue there involved was appellants' right to allotment trust patents under the proceedings had and taken in 1927 and under the certificates issued by the Allotting Agent to appellants on May 9, 1927.

It is also apparent from said pleadings in the former case that appellants' right to allotment trust patents under the proceedings had and taken, and under the certificates issued by the Allotting Agent, in the year 1923 was

not there in issue and was not there involved or decided.

Inasmuch as appellants' right to allotment trust patents to the lands selected by and allotted to them is, in the present case, based upon the proceedings had and taken and upon the certificate issued by the Allotting Agent in 1923, it is obvious that the judgment in the former case is not *res judicata* as to the issues involved in the present case.

V.

Specification of Errors.

1. The District Court erred in holding that its judgments in the suits styled *Viola J. Hatchitt v. United States of America*, No. Eq. 1209-M (later numbered Eq. 1209-Y), and *Juana S. Hatchitt v. United States of America*, No. 1208-Y Eq., are *res judicata* as to all matters of law and fact raised by the complaints in the present cases.

2. The District Court erred in refusing to hold that the United States of America is estopped, because of the fiduciary relationship existing between it and appellants, to rely upon the doctrine of *res judicata* as a bar to the lawful claims and demands of appellants as alleged in their complaints herein.

3. The District Court erred in refusing to hold that the United States of America is estopped because of the Acts of Congress pleaded in appellants' complaints and because of the acts, conduct, proceedings, statements and representations of the Secretary of the Interior and of

the Special Allotting Agent of the United States likewise pleaded in said complaints, to question, or deny, appellants' equitable title to the lands described in said complaints, or their right to allotment trust patents thereto, or their right to the sole and exclusive possession, use and enjoyment thereof

VI.

Summary of Argument.

The former decision is not *res judicata* because different claims and demands are involved in the present cases.

The United States is estopped to plead and rely upon *res judicata* because of the fiduciary relationship existing between it and appellants.

The United States is estopped to question, or deny, appellants' equitable title to the lands allotted to appellants because of the Acts of Congress, and because of the acts, conduct, proceedings, statements and representations of the Secretary of the Interior and H. E. Wadsworth, Special Allotting Agent of the United States for the Mission Indians of California, as pleaded and set forth in Appellants' Complaints.

By the Act of March 2, 1917, the Congress abolished the right and discretion of the United States, its officers and agents, to deny, or withhold, allotment trust patents from appellants for the lands selected by and duly allotted to them in the year 1923

VII.
ARGUMENT.

POINT ONE.

The Former Decision Is Not *Res Judicata* Because Different Claims and Demands Are Involved in the Present Case.

It is settled by many decisions of the Supreme Court of the United States that if a different claim or demand is involved in the subsequent action, the decision in the former case is not *res judicata*. This principle has been illustrated in various decisions of that Court, some of which are noted below.

In *Larsen v. Northland Transp. Co.*, 292 U. S. 20, 54 S. Ct. 584, 78 L. Ed. 1096, the Supreme Court said, at p. 25 (292 U. S.):

“The established rule in this Court is that if in a second action between the same parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the prior cause is an estoppel ‘only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.’ *Bates v. Bodie*, 245 U. S. 520, 526, 38 S. Ct. 182, 184, 62 L. Ed. 444, L. R. A. 1918C, 355; *United States v. Moser*, 266 U. S. 236, 241, 45 S. Ct. 66, 69 L. Ed. 262; *United Shoe Machinery Corp. v. United States*, 258 U. S. 451, 458, 42 S. Ct. 363, 66 L. Ed. 708. ‘. . . A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action.’ *Freeman on Judgments* (5th Ed.), Section 786.”

The issue involved in the former cases was, in brief, appellants' right to allotment trust patents for the lands allotted to them by the proceedings had in the year 1927. Nothing more was, or could be, litigated in those cases. Through an incorrect interpretation of applicable Acts of Congress, the former decisions on that issue were against appellants.

The issue in the present cases is the right of appellants to allotment trust patents to the lands allotted to them by the proceedings had in the year 1923, and this issue was in no way involved in the former decision. This right was not litigated in the former cases, and the point is now open for decision. In this connection, see *Bates v. Bodie*, 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444; *United States v. Moser*, 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262; *Southern Pac. Ry. Co. v. United States*, 168 U. S. 1, 18 S. Ct. 18, 27, 42 L. Ed. 355; *Eller v. Paul Revere Life Ins. Co.*, 135 F. (2d) 403, 405; *Cromwell v. Sac. County*, 94 U. S. 351, 354, 24 L. Ed. 195, 198; *Steam Packet Co. v. Sickles*, 24 Howard 333, 16 L. Ed. 650; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 319, 47 S. Ct. 600, 602, 71 L. Ed. 1069.

In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, *supra*, the Court said at page 319:

"But if the second case be upon a different cause of action, *the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted*, upon the determination of which the judgment or decree was rendered. (Citing cases.)" (Italics ours.)

In other words, the estoppel of a judgment cannot extend beyond the point actually litigated and determined in

the former action. It was so decided in *Cromwell v. Sac. County*, 94 U. S. 351, 354, 24 L. Ed. 195, 198, *supra*, where, after review of some English and American cases and some of its own decisions upon *res judicata*, the Supreme Court said:

“*These cases*, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, *negative the proposition that the estoppel can extend beyond the point actually litigated and determined.*” (Italics ours.)

The rule in California is in accord with the rule stated in the above cited cases. The California courts recognize the exceptions to the general rule, and the case at bar falls within the exceptions. In *Title Guarantee & Trust Co. v. Monson*, 11 Cal. (2d) 621, the Supreme Court said, at pp. 631, 632:

“Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action. (34 C. J. 818, 823.) (See, also, to the same effect: *Humiston, Keeling & Co. v. Bridgman*, 195 Mich. 82 (161 N. W. 852), *Townslley v. Niagara Life Ins. Co.*, 218 N. Y. 228 (112 N. E. 924), *Cook v. Conners*, 215 N. Y. 175 (109 N. E. 78, Ann. Cas. 1917A, 248, L. R. A. 1916A, 1074), *Beavans v. Groff*, 211 Ind. 85 (5 N. E. (2d) 514, 108 A. L. R. 694), *Eisenberg v. Thorne*, 49 Misc. 617 (96 N. Y. Supp. 1020), *Fourche River Lumber Co. v. Walker*, 96 Ark. 540 (132 S. W. 451), *Moore v. Snowball*, 98 Tex. 16, 24 (81 S. W. 5, 107 Am. St. Rep. 596, 66 L. R. A. 745), and

Paris v. Golden, 96 Kan. 668(153 Pac. 528, 529).) In the case of *Todhunter v. Smith*, 219 Cal. 690, 695 (28 Pac. 2d 916), it is said: 'The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.'"

In *U. S. Fidelity & Guaranty Co. v. McCarthy*, 33 F. (2d) 7 (cert. den. 280 U. S. 590) it was contended that a surgeon, whose hand was injured by the severing of a median nerve, was totally disabled from performing any work as a surgeon. He brought an action to recover benefits for a certain period. Later he sued to recover benefits for another period. In each case he was successful. In a third action for another and wholly different period, his motion for summary judgment was granted on the theory that his alleged total disability had been in issue and was established in the former actions and, hence, was *res judicata*. Upon appeal, the Circuit Court of Appeals reversed the judgment on the ground that judgments in the former cases were not conclusive as to total disability for a later period than the periods involved in the former actions.

It may be noted that many authorities hold that *actual identity* of parties and of causes of action is essential to the creation of an estoppel by a former judgment. (34 *Corpus Juris* 802, Section 1225, *et seq.*, and cases cited. See, also, Annotations, 65 *A. L. R.* 1113; 70 *A. L. R.* 1447; 88 *A. L. R.* 563.) Identity of causes of action is lacking in the case at bar.

It is also worthy of note that decisions on mere questions of law do not operate as *res judicata* when divorced from the subject matter to which the law was applied. (See 2 *Freeman on Judgments* (5th Ed.), Section 709; *United States v. Moser*, 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262; *Southern Pac. Co. v. Van Hoosear*, 72 F. (2d) 903, 906; *Blaffer v. Com'r of Int. Rev.*, 134 F. (2d) 389, and cases there cited.) The point is particularly pertinent in view of the erroneous construction placed upon the Act of March 2, 1917 (39 Stat. L. 976, 25 U. S. C. A., Section 331) and other applicable Acts of Congress in the former decisions pleaded here as *res judicata*. (See *Arenas v. United States*, 322 U. S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363.)

Illustrative of the point is the textual statement in 2 *Freeman of Judgments* (5th Ed.), Section 709, *supra*, as follows:

“Decisions on mere questions of law do not operate as *res judicata* when divorced from the particular subject matter to which the law was applied, though they may be followed as precedents under the doctrine of *stare decisis*.”

In *United States v. Moser*, 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262, *supra*, the Supreme Court said:

“The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.”

Other cases on the point are: *Dennison v. United States*, 168 U. S. 241, 18 S. Ct. 57, 42 L. Ed. 453; *Irving Nat'l Bank v. Law*, 10 F. (2d) 721. See, also, *Von Moschzisker, Res Judicata*, 38 Yale L. J. 299, 302.

In view of the foregoing, the former decisions are not *res judicata* of the issues, claims and demands involved in the cases at bar.

POINT TWO.

The United States Is Estopped to Plead and Rely Upon Res Judicata Because of the Fiduciary Relationship Existing Between It and Appellants.

Under the authorities it is clear that the relationship between the United States of America and appellants is that of guardian and ward or trustee and beneficiary. (See, 42 C. J. S., p. 672, Sec. 20; *United States v. Klamath and Moadoc Tribes*, 304 U. S. 119, 58 S. Ct. 799, 82 L. Ed. 1219; *Jaybrid Mining Co. v. Weir*, 271 U. S. 609, 46 S. Ct. 592, 70 L. Ed. 1112; *United States v. Ramsey*, 271 U. S. 467, 46 S. Ct. 559, 70 L. Ed. 1039; *United States v. Payne*, 264 U. S. 446, 44 S. Ct. 352, 68 L. Ed. 782; *Cramer v. United States*, 261 U. S. 219, 43 S. Ct. 342, 67 L. Ed. 622; *Board of Co. Comrs. v. Seber*, 130 F. (2d) 663, aff. 318 U. S. 705.) By the express provisions of the Mission Indian Act (Act of January 12, 1891, Ch. 65, 26 Stat. L. 712) the relationship of trustee and beneficiary between the United States and the Mission Indians of California was established. (See, *Arenas v. United States*, 320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363.)

As a fiduciary the United States neither has, nor can have, a pecuniary interest in the lands of the Mission

Indians of California. Such interest as the Government has in said lands is only that of a trustee, and the duty of a trustee is the only duty it can exercise in reference to the trust property. (See, *Mission Indian Act, supra*; *United States v. Algoma Lbr. Co.*, 305 U. S. 415, 59 S. Ct. 217, 83 L. Ed. 260; *United States v. Forrest Lbr. Co.*, 305 U. S. 415, 59 S. Ct. 217, 83 L. Ed. 260; 42 C. J. S. 672, Sec. 20; *Jaybird Mining Co. v. Weir, supra*; *United States v. Ramsey, supra*.) It is not to be questioned here that the United States is charged with the same duties and obligations as are imposed by law upon other fiduciaries.

It is not only the duty of the United States not to assert any pecuniary claim against the rights of restricted Indians, but it is also its bounden duty to protect those rights (*Civil Code of California*, Section 2228; *Restatement of the Law of Trusts*, Section 170), and this duty extends to the bringing of suits necessary to protect such rights. (*Mashunkashey v. United States*, 131 F. (2d) 288, cert. den. 318 U. S. 764, 63 S. Ct. 665, 87 L. Ed. 1136; *United States v. Colvard*, 89 F. (2d) 312; *United States v. Nez Perce County*, 95 F. (2d) 232.) As was said in *Mashunkashey v. United States*, 131 F. (2d) 288, *supra*, at page 290:

“Appellant challenges the right of the government to maintain this action. It is true, as asserted by appellant, that the declaratory judgment act creates no new rights. The right of the government to maintain this action must be found in the general law. The government brought this action in its own right and in its capacity as guardian of the restricted Indians. As guardian of such Indians, the govern-

ment stands charged with all the obligations attending such a relationship. It not only has the power to institute actions to preserve the rights of its wards, *Heckman v. United States*, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820; *United States v. Minnesota*, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539; *McCarty v. Hollis*, 10 Cir., 120 F. (2d) 540, but it is its duty to do so when those rights are threatened."

Instead of contesting appellants' right to allotment trust patents to the lands allotted to them in 1923, it is the duty of the Government, inherent in its trusteeship, to so act that appellants may receive said trust patents under the 1923 allotment schedules. (*Act of March 2, 1917*, 39 Stat. L. 969-976, amending Mission Indian Act; *Arenas v. United States*, 320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363; 42 C. J. S. 672, Sec. 20.) It clearly is not the duty of the Government, by the highly technical defense of *res judicata*, to attempt to defeat the lawful right of appellants to their allotment trust patents; and the Government's *bona fides* can best be shown by co-operating to secure this right under the law as construed by the Supreme Court of the United States in the *Arenas* case, *supra*.

The decisions of the District Court and of this Court in the former cases (*St. Marie v. United States* and companion cases, 24 F. Supp. 237, Aff. 108 F. (2d) 876) rested upon the incorrect assumption that the Secretary of the Interior had absolute discretion and power to refuse approval, or to affirmatively disapprove, the allotments made by the Special Allotting Agent of the United States to the members of the Palm Springs Band of Mission Indians. The Supreme Court reached a differ-

ent conclusion in the *Arenas* case (320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363) where it said, at pp. 425, 426 (320 U. S.):

"The Act of 1891 provides that 'whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, *in the opinion of the Secretary of the Interior*, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians.' (Emphasis supplied.) This undoubtedly conferred a very considerable discretion upon the Secretary.

"The Act of 1917, however, drops the language of discretion and *directs* the Secretary to cause allotments to be made to the Indians on the Mission Reservations. The Act was prepared by the Secretary and if it was intended to perpetuate his discretion as to whether the allotment policy was to be applied to these Indians at all, it might easily have so provided. Both the Secretary and Congress appear to have settled that point."

And, commenting further upon the mandatory provisions of the Act of 1917, the Court said, at p. 427 (*Id.*):

"To assume that the Act of 1917, while directing the Secretary to make allotments, only meant to give him uncontrolled discretion not to do so would be a doubtful construction, in view of its history. But even if it were so interpreted, it did not require the Secretary to manifest his exercise of discretion in any formal way. His opinion that the Indians had the capacity for individual responsibility for land ownership could be indicated by conduct as well as by words. We think his conduct and words amount both to an administrative construction of the 1917 Act as a direction and to the exercise of any discretion he may have had under it."

It cannot be doubted that the Supreme Court was of the opinion that the Act of 1917 abolished the discretion of the Secretary of the Interior, and directed him by legislative mandate to make allotments to these Indians, and that the Congress, by said Act, found that they were sufficiently advanced in civilization as to be capable of owning and managing lands in severalty, for the Court said in respect thereto:

“History and common knowledge of these Indians would indicate that they are not wanting in whatever it is that makes up ‘civilization’ . . . By the standards of peacefulness, industry, and gentleness these Indians have long been ‘civilized.’” (*Id.*, pp. 427, 428.)

Nor, under the facts shown by this record, are appellants inhibited from asserting that the United States is estopped to plead and rely upon *res judicata*. It is, of course, true that the United States is not to be estopped when acting in the capacity of a sovereign; but it is also true that when acting in a proprietary capacity the doctrine of estoppel may be applied to it. (31 C. J. S. 403, *et seq.*, Section 140; 21 C. J. 1186-1888; *The Falcon*, 19 F. (2d) 1009; *Dayton Airplane Co. v. United States*, 21 F. (2d) 673.) In this connection, it should be noted that the decisions of the Supreme Court in *Utah Power & Lowe Co. v. United States*, 243 U. S. 389, 37 S. Ct. 387, 61 L. Ed. 791, and *Yuma County Water Users' Ass'n v. Schlecht*, 261 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909, are not applicable to the cases at bar. The rule stated in those cases is that the United States cannot be estopped by the *unauthorized* acts, agreements and statements of its agents. But the rule is different when, as here, the

agents of the Government not only had authority but had been given a mandate by Congress to perform the acts and make the statements and representations alleged in the complaints.

In view of the foregoing considerations and authorities, appellants submit that the United States is estopped as a fiduciary to plead and rely upon *res judicata* as a bar to the relief sought by appellants in these actions.

POINT THREE.

The United States Is Estopped to Question or Deny, Appellants' Equitable Title and Right to Allotment Trust Patents to the Lands Allotted to Them in 1923 Because of the Acts of Congress, and Because of the Acts, Conduct, Proceedings, Statements and Representations of the Secretary of the Interior and of the Special Allotting Agent of the United States, as Pleaded and Set Forth in Appellants' Complaints.

The doctrine of equitable estoppel is applicable to the United States under the Acts of Congress and the facts pleaded in appellants' complaints. It is unnecessary to restate these in detail. The following will serve to establish equitable estoppel.

On June 21, 1923, the Allotting Agent, lawfully appointed and empowered by the Secretary of the Interior to survey, classify and allot lands to the Mission Indians of California, and who had fully performed those duties, issued and delivered certificates of allotment to appellants for the lands described in their complaints. Shortly thereafter and in 1923, the Allotting Agent, upon the authority of the Secretary, put appellants in possession of said lands. On or about October 26, 1923, said Al-

lotting Agent stated and represented to appellants that the certificates issued and delivered to them entitled them to the possession and use of said lands and that said certificates would be evidence of their right to allotment trust patents thereto and of their right to possess and improve the same. Thereafter, believing and relying upon said certificates and said acts, statements and representations of said Allotting Agent, appellants made costly improvements upon said lands consisting of buildings for residential and business purposes in the approximate amount of \$50,000.00 which they would not have made otherwise. Appellants at all times since 1923 have been in the full and complete possession, use and enjoyment of said lands and the improvements made thereon with the knowledge and consent of the United States. Under these facts it would be a constructive fraud upon appellants to deny their equitable right and title to said lands and their right to allotment trust patents thereto

An excellent statement of the rule here applicable is made in *United States v. Standard Oil Company of California*, 20 F. Supp. 427, at page 452, as follows:

" . . . the doctrine of estoppel may be asserted successfully against it (the United States) when it or its agents have been guilty of acts which amount to fraud and which were acted on in good faith by others to their detriment. 21 C. J. 1186 *et seq.*; *United States v. Stinson* (C. C. A. 7, 1903), 125 F. 907; *Id.* (1905), 197 U. S. 200, 25 S. Ct. 426, 49 L. Ed. 724; *State of Iowa v. Carr* (C. C. A. 8, 1911), 191 F. 257. And see *Pan-American Petroleum & Transport Co. v. United States* (1927), 273 U. S. 456, 506, 47 S. Ct. 416, 424, 71 L. Ed. 734."

It cannot be doubted that appellants, in good faith and to their detriment, acted upon the acts, proceedings, conduct, statements and representations of the Allotting Agent and of the Secretary of the Interior in entering into the possession of, and in making costly improvements upon, the lands allotted to them.

Equitable estoppel is defined in 31 *C. J. S.* 236, Section 59, as follows:

"Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts."

This definition is in accord with the rule in California thus stated in 10 *Cal. Jur.* 626, Section 14:

"The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood, and the law abhors both. In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised

of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury.”

Many California cases are cited to support the text, *supra*.

The cases at bar fall squarely within the rule thus announced, and since there is no reason why the United States, as a fiduciary, may not be estopped by its acts and conduct, or by the acts and conduct of its agents (Point Two, *ante*), we submit that it is estopped to question, or deny, appellants' equitable title and right to allotment trust patents to the lands allotted to them in 1923.

Conclusion.

Wherefore, appellants pray that the judgments herein be reversed and that these causes be remanded to the District Court for trial on the issues made by the complaints and answers of the parties, respectively.

Respectfully submitted,

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

VIOLA JUANITA HATCHITT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JIANA SATURNINO HATCHITT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11205

VIOLA JUANITA HATCHITT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JUANA SATURNINO HATCHITT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

OPINION BELOW

The unreported opinion of the district court is found at R. 40-45.

JURISDICTION

This consolidated appeal is from final judgments of the trial court entered June 20, 1945, upon the motion of the Government in each case for a summary judgment of dismissal of a complaint which sought to establish plaintiff's right to a trust patent for a particular allotment on the Palm Springs Indian Reservation

(R. 50, 52). Notices of appeal were filed September 1, 1945 (R. 54). The jurisdiction of the district court was invoked under the Act of August 15, 1894, 28 Stat. 286, as amended, 25 U. S. C. sec. 345, which authorizes Indians who are claiming allotments to prosecute suits therefor in the proper district courts of the United States and gives those courts jurisdiction of such suits. The jurisdiction of this Court rests upon section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a), and upon the Act of August 15, 1894, as amended, 25 U. S. C. sec. 345, providing that, in cases under that Act, the right of appeal shall be allowed to the parties as in other cases.

STATUTE INVOLVED

The material portion of the Act of August 15, 1894, 28 Stat. 286, as amended, 25 U. S. C. sec. 345, is set out in the appendix, *infra*, p. 11.

QUESTIONS PRESENTED

1. Whether the judgment in the case of *St. Marie v. United States*, 108 F. 2d 876, bound and concluded the parties hereto as to the subject matter of this action, and, if not,

2. Whether appellants were entitled to trust patents for certain lands in the Palm Springs Indian Reservation.

STATEMENT

Viola Juanita Hatchitt, a minor, by Juana S. Hatchitt, *prochein ami*, filed an action, No. 1209-M, in the District Court of the United States for the Southern District of California, Central Division, for

a trust patent to a certain allotment on the Palm Springs Indian Reservation (R. 21). Juana Saturnino Hatchitt filed a like action, No. 1208-M. Pursuant to stipulation, the two cases were renumbered 1209-Y Eq. and 1208-Y Eq., respectively, consolidated for hearing, and tried with the case of *Genevieve P. St. Marie v. United States*, No. 918-Y Eq. (cf. R. 41). Judgments were entered for the United States (R. 34). *St. Marie v. United States*, 24 F. Supp. 237. Appeal was taken to this Court which affirmed the judgments. 108 F.2d 876. The Supreme Court of the United States denied certiorari for the reason that the petition therefor was filed too late. 311 U. S. 652.

Viola Juanita Hatchitt and Juana Saturnino Hatchitt subsequently filed new suits, 4235 O'C. Civil and 4236 O'C. Civil, for the same relief claimed in their prior actions (R. 2, 9). Answers were made (R. 10, 35) and the Government then moved for summary judgments of dismissal on the ground that the parties were bound and concluded as to the subject matter of their actions by the decrees entered in their prior suits (R. 36). The details concerning the preparation of allotment schedules relating to the Palm Springs Reservation are set out at length in the Government's brief in *United States v. Lee Arenas*, No. 11,195, now pending in this Court. As appears therein (pp. 7-11), a schedule was prepared by Wadsworth, the allotting agent, in 1923. Subsequently, he was instructed to draw up an entirely new schedule so as to include only those Indians who voluntarily made selections and such a schedule was prepared in 1927. Thereafter the Secretary of the Interior expressly disap-

proved the allotment schedule. The district court held that the decree in the St. Marie litigation was *res judicata* of appellants' present suits (R. 40-46). Accordingly, the court, by order of May 29, 1945, granted the motions of the Government (R. 40), and final judgments of dismissal were entered June 20, 1945 (R. 50, 52). These appeals followed. The evidence and proceedings in *United States v. Lee Arenas*, now pending in this Court, No. 11,195, were received in evidence as part of the proceedings in these cases and, by stipulation, were included in the record here by reference (R. 57-58).

ARGUMENT

I

The judgment in the case of *St. Marie v. United States* bound and concluded the parties hereto as to the subject matter of this action.

A. Appellants Are Asserting the Same Causes of Action that Were Determined in the St. Marie Case.—Appellants state that “if a different claim or demand is involved in the subsequent action, the decision in the former case is not *res judicata*.” (Br. 14).¹ We agree. But here there is no different claim or demand. The issue in the former case was the right of appellants to trust patents for the lands in suit. That is the issue in this case. What appellants seek to do here is to relitigate this issue, again asserting their claims to the same property but on the

¹ It should be noted that appellants did not state that this contention would be one of the points to be relied upon in this appeal (R. 62-63).

basis of other facts—what was done by the Special Allotting Agent in 1923 rather than in 1927. This is a matter which might have been litigated in the former case, and appellants are foreclosed from raising it now. *United States v. California and Ore. Land Co.*, 192 U. S. 355 (1904); *Northern Pacific Railway v. Slaght*, 205 U. S. 122, 133 (1907). *MacDonnell v. Capital Co.*, 130 F. 2d 311, 317-318 (C. C. A. 9, 1942).

In the oft-cited *Northern Pacific Railway* case, the court said (p. 133):

In other words, plaintiff in error, as successor of the Spokane and Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of *res adjudicata* and the cases enforcing and illustrating that principle declare otherwise.

There, as here, it was argued that the only effect of the former decree was to decide against what was there asserted as the basis of a right to the property in suit. But the court held otherwise, and in connection with the determination of what constituted a "new claim or demand", adopted the following statement of the rule by Herman on Estoppel, sec. 92 (p. 131):²

² The Court in passing points out that a distinction between personal actions and real actions should be noted in the consideration of this question.

Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for *the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.* [Italics supplied.]

The mere multiplication of grounds alleged as causing the same injury does not result in multiplying the causes of action. *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 321 (1927). That case, cited by appellants (Br. 15) as authority for the proposition that the instant case involves a cause of action other than that in the former cases, clearly points to the contrary conclusion. If appellants had pursued the quotation they make one sentence further they would have found that that case was held not to fall under the branch of the rule they seek to invoke but "that the facts here gave rise to a single cause of action for damages and that the first branch of the rule applied" (p. 319). The court relies upon and discusses the case of *United States v. California and Ore. Land Co.*, 192 U. S. 355 (1904) in support of its holding. That case held that a different means of establishing title

to the fee of property was not a new cause of action and did not remove the bar of *res judicata*. In the *Baltimore S. S. Co.* case, the Court laid down a principle which applies directly to the case at bar. It said (p. 321):

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action.

Cf. *Dern v. Tanner*, 96 F. 2d 401, 403 (C. C. A. 9, 1938).

Here, appellants are asserting a claim to trust patents of the identical land for which they claimed patents in the former suits (R. 23, 4). It follows that the earlier judgments conclusively determine that they have no rights to such patents.

B. *The United States Is Not Estopped To Plead Res Judicata*.—Appellants, in point two of their brief, argue that because of the relationship existing between the Government and the Indians, the United States is estopped to plead *res judicata*. No case so holding is cited nor has any been found. On the contrary, the Supreme Court has declared, in a suit by Indians against the United States, that but for

the enactment of a specific statute waiving a former adjudication in the suit,³ the doctrine of *res judicata* would clearly apply. *Cherokee Nation v. United States*, 270 U. S. 476, 486 (1926). Cf. *Klamath Indians v. United States*, 296 U. S. 244 (1935) and *United States v. Klamath Indians*, 304 U. S. 119 (1938). Certainly, no reason is apparent why there should not be an end to litigation between an Indian and the United States as well as between other litigants. The argument is essentially moralistic, appellants contending that "it is not the duty of the Government, by the highly technical defense of *res judicata*, to attempt to defeat the lawful right of appellants to their allotment trust patents" (Br. 21). However, the paramount Governmental duty here is to protect the interests of all the Palm Springs Indians, and to make sure that some members will not secure an unjustified advantage over the others, which would be the case if appellants prevailed. By parity of reasoning the argument would be that because the Government is the guardian of the plaintiffs who sue under the 1894 Act, it could never assert any defense to such suit. Plainly Congress had no such intention when it passed the 1894 Act.

Furthermore, appellants admit (Br. 23) that the Government may not be estopped when acting in a

³ For a compilation of Acts of Congress which, in conferring jurisdiction on the Court of Claims in Indian cases, have limited the claims to those not theretofore determined or have expressly authorized the trial *de novo* of claims theretofore determined, see Cohen, Handbook of Federal Indian Law, page 376, footnotes 134 and 135.

sovereign rather than a proprietary capacity, and the Supreme Court has stated that in this type of case the Government's relation to the Indians is that of a sovereign. *United States v. Shoshone Tribe*, 304 U. S. 111, 116-118 (1938). And, as this Court stated in *Berger v. Ohlson*, 120 F. 2d 56, 60 (1941) with reference to a similar attempt to apply estoppel to the Government when it was allegedly acting in a proprietary capacity "We are of the opinion that the cases cited do not support such an exception to the established rule."

II

Even if appellants were not bound by the former judgments, they have no right to the trust patents claimed by them

In *United States v. Lee Arenas*, No. 11,195 now pending in this Court, the Government takes the position that the members of the Palm Springs Band whose names are included on the 1923 and 1927 schedules do not have a right to trust patents to the allotments listed on those schedules.⁴ For this additional reason, we submit that the dismissal of appellants' complaints was correct.

In point three, appellants (Br. 24-27) contend that the United States is estopped to deny their right to trust patents. For the reasons stated in the *Arenas* brief, pp. 29-34, we submit that the Government is not estopped. Appellants also refer to the merits of the case in point two (Br. 21-23), where they take

⁴ The record in the *Lee Arenas* case was incorporated by reference into the record on this consolidated appeal (R. 57-58).

the position that the Supreme Court's decision in *Arenas v. United States*, 322 U. S. 419, establishes their right to the patents. For the reasons stated in the *Arenas brief*, pp. 14-18, we submit that, on the contrary, the Supreme Court's decision supports the refusal of the Secretary of the Interior to make allotments according to the 1923 and 1927 schedules.

CONCLUSION

Accordingly, it is submitted that the judgments of the district court should be affirmed.

Respectfully,

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APRIL 1946.

APPENDIX

The pertinent portion of the Act of August 15, 1894, 28 Stat. 286, as amended, 25 U. S. C. sec. 345, is as follows:

§ 345. Actions for allotments. All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

No. 11205

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

VIOLA JUANITA HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

JUANA SATURNINO HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANTS' REPLY BRIEF.

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UNITED STATES OF AMERICA,

Respondent.

APPELLANTS' REPLY BRIEF.

The several statements, specification of errors, and summary of argument, required by Rule 20 of this Court, are fully set forth at pages 1 to 13, inclusive, of Appellants' Opening Brief, to which reference is made.

In its brief, appellee contends that "The judgment in the case of St. Marie v. United States bound and concluded the parties hereto as to the subject matter of that action." (Br. p. 2.) Appellee also contends that "The issue in the former case was the right of appellants to trust patents

for the lands in suit," and then adds "That is the issue in this case." (Br. p. 4.) These statements of the matters involved in the two suits are more plausible than correct. Appellee further says, "Appellants are asserting the same causes of action that were determined in the *St. Marie* case," and that "The United States is not estopped to plead *res judicata*."

I.

Appellants Are Not Asserting the Same Causes of Action That Were Litigated in the *St. Marie* Case.

The subject matter involved in the *St. Marie* case, as stated in the prayer of the complaint therein, was whether "the United States allotted to the complainant *on May 9, 1927*, for her sole use and benefit, the lands above described in this her bill of complaint." [Tr. p. 26.] As stated by the District Court, "We are to determine whether the plaintiffs acquired vested rights, the recognition of which we can compel." (*St. Marie v. United States*, 24 F. Supp. 237, at p. 239.) A better statement of the subject matter of the former suit would be: "The issue in the former case was the right of appellants *under the proceedings had and certificates of allotment issued in 1927*, to allotment trust patents for the lands in suit." Appellee overlooks the all-important fact that the former suit did not involve the proceedings had and the certificate of allotment that was issued in 1923; and it is this fact which clearly distinguishes the issue in the former case from the issue in the present case. The issue in the present case, as stated in the language of the complaint, is whether "*on the 21st day of June, 1923*, the United States allotted . . . in severalty to plaintiff . . . the lands

described in Paragraph III of this complaint." [Tr. p. 8.] Inasmuch as the issues are not the same in the two cases, it follows that the rules of law invoked by appellee are not here applicable or controlling.

Appellee admits, as indeed it must under the authorities cited in Appellants' Opening Brief, that "if a different claim or demand is involved in the subsequent action, the decision in the former case is not *res judicata*." (Br. p. 4.) There can be no doubt as to the soundness of the principle of law thus stated. (See Op. Br. pp. 14-19.) It has almost unanimous approval by the State and Federal Courts, and is thoroughly imbedded in the decisions of the Supreme Court of the United States.

The important question here is, what constitutes a different issue from the one alleged to have been litigated and decided in the *St. Marie* case? First in importance, of course, is what was there *decided*. The judgment itself is not enlightening, for it decided only that "complainant take nothing by her action." [Tr. p. 35.] We must look to the opinions of the District Court and of this Court for the desired information. (*St. Marie v. United States*, 24 F. Supp. 237, affirmed 108 F. (2d) 876.)

In the opinion of the District Court it was said, at page 239 (24 F. Supp.):

" . . . the facts, in the main, are undisputed. We are to determine whether the plaintiffs acquired vested rights, the recognition of which we can compel."

Following which, at page 23 (*id.*), that Court said:

"It is evident that this procedure (*i. e.*, to complete an allotment) contemplates the following acts on the part of the Secretary:

(1) A determination that, in his opinion, the Indians have reached the degree of civilization spoken of in the Act.

(2) An order setting up the mechanics for selection.

(3) Actual allotments approved by the Secretary. These acts are all optional involving the exercise not of ministerial but of executive and almost quasi-judicial discretion and judgment."

The true basis of the District Court's decision is clearly shown by the following language of the opinion (*id.* p. 241):

"However, where, as here, discretion is lodged in the Secretary and the selector is not entitled to a patent until certain conditions precedent, dependent upon the action of the Secretary, are complied with, he cannot assert any rights until he has shown compliance with them."

Upon appeal this Court affirmed the judgment of the trial Court upon the grounds *inter alia* that the General Allotment Act does not confer upon the Palm Springs Band of the Mission Indians in California the right to select allotments and that said Act was not applicable to said Indians. By its opinion in the *St. Marie* case, this Court appears to have approved the grounds of the decision of the District Court in the following language (*St. Marie v. United States*, 108 F. (2d) 879):

"The trial court held that before there could be a valid allotment the Secretary must: (1) determine that the Indians have reached the degree of civilization required by the Act; (2) make an order 'Setting up the mechanics for selection'; and (3) make and

approve actual allotments; that no allotment was made; and that if the certificates of selection could be considered as certificates of allotment the same were not effective because there had been no determination that the Indians in question were sufficiently advanced so as to comply with the Act, and the approval of the Secretary was lacking."

This Court declined to pass upon the power of the Secretary to determine when the Mission Indians are sufficiently advanced in civilization to warrant allotments in severalty, saying in that behalf (*id.* p. 881):

"Since this is not a proceeding to compel action by the Secretary, we need not determine which meaning is correct."

From the above quoted, and other, language of the District Court and of this Court, and from the language of the bill of complaint in the *St. Marie* case, it is too clear for question that the decision therein involved only the right to allotment trust patents under and by virtue of the proceedings had, and the certificate issued, in 1927. The proceedings and certificate of 1923 were not involved in the former case. The claim litigated in the former case was whether under the proceedings and certificate of 1927, plaintiffs acquired rights to allotment trust patents, "the recognition of which . . . (the Court) can compel." (*Supra*) "Estoppel (cannot) extend beyond the point actually litigated or determined." (*Cromwell v. Sac. County*, 94 U. S. 351, 354, 24 L. Ed. 194, 195, and cases cited; also, *Title Guarantee & Trust Co. v. Manson*, 11 Cal. (2d) 631, and cases cited.) "A former judgment . . . operates as an estoppel . . . as to such issues in the second action as were actually litigated and determined in

the first action.” (*Todhunter v. Smith*, 219 Cal. 690, 695.) A “prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted . . .” (*Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 319, 47 S. Ct. 600, 602, 71 L. Ed. 1069.)

The judgment in the *St. Marie* case did not decide that appellants have no right to allotment trust patents for the lands in suit under the proceedings had and the certificates of allotment issued in 1923. Appellee has not directed this Court’s attention to any part of the record in the *St. Marie* case showing that the right to allotment trust patents under the 1923 proceedings and certificates was, in that case, put in issue, litigated or decided, nor can it do so.

Moreover, the decisions of the District Court and of this Court in the *St. Marie* case decided mainly, if not entirely, questions of law relating to or arising out of the proceedings had and certificate issued in 1927. Both decisions, in effect, have been held to be erroneous by the Supreme Court of the United States in *Arenas v. United States*, 320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363, and are therefore not controlling here either as *res judicata* or *stare decisis*.

As stated in Appellants’ Opening Brief (pp. 18, 19), even correct decisions upon questions of law do not operate as *res judicata* in a subsequent action if a different issue is there involved, although the correct decision on a pure legal question might operate as *stare decisis* in the latter case. Obviously, an incorrect decision upon a question of law can have no force after it is overruled by the Supreme Court of the United States, and this is especially true when applied to a different demand in a later case.

(See authorities cited, Op. Br. pp. 18, 19.) In the present case the demand is different from the demand in the *St. Marie* case. The cases cited by appellee to the contrary are not convincing. In *Northern Pacific Railway v. Slaght*, 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 742, the Supreme Court held that where plaintiff's title to land was placed directly in issue in both the former and later cases, the judgment in the former case was *res judicata* in the later case, the issue being the same.

The case at bar is not an action to quiet title as between adverse claimants. Title, as such, is not involved at all. The United States does not claim that it has any proprietary or beneficial interest in the lands involved in suit; clearly, it is a mere trustee for the owners of the land, whether tribal, or individual. On the other hand, appellants do not claim that they have acquired or that they are now entitled to fee simple title to the lands in question, nor are they asking for a conveyance to them of such a title. In reality, appellants seek only a judicial declaration that the acts, conduct, statements, promises, and proceedings of the Secretary of the Interior and the Allotting Agent, followed by the issuance of certificates of selections for allotment, in 1923 are sufficient, under the several applicable Acts of Congress pleaded and relied on herein, to entitle appellants to allotment trust patents under which, at the expiration of twenty-five years from the effective date thereof, to wit: June 21, 1923, appellants will be entitled to patents in severalty conveying the title in fee simple to them. This issue did not arise nor was it litigated or decided in the *St. Marie* case.

The statute under which the prior, as well as the present, action was instituted plainly authorizes declaratory relief. (28 Stats. 286, 25 U. S. C. A., sec. 345.) No coercive

relief was sought in the former case, and this clearly appears from this Court's concluding statement that, "Since this is not a proceeding to compel action by the Secretary, we need not determine which meaning is correct." (*St. Marie v. United States*, 108 F. (2d) 876, 881.) Nor is coercive relief sought in the present case. It therefore follows that no injury could have resulted to the United States in the former case, and that none can result to it in the present case.

A suit to declare the right to an allotment of land under one set of proceedings, and a suit to declare the right to an allotment of the same land under a different set of proceedings and regulations do not necessarily create the same estate or cause of action. If, for example, the decision in the *St. Marie* case had been for the plaintiffs therein, the judgment would have given appellants the right to an allotment as of May 9, 1927, and the trust period would have begun to run only from that date; whereas, if judgment had been for appellants in the present case, the trust period would begin to run from June 23, 1923. Thus, different estates are shown to be involved in the two cases.

The present suit rests upon allotment proceedings which terminated on June 23, 1923, and appellants' rights thereunder are reinforced by estoppel arising out of the placing of valuable improvements upon the lands allotted to them. The issue as to estoppel and as to the validity of the 1923 allotment proceedings could not have been litigated under the pleadings in the former action. Since no relief was granted to the United States in the former action, no prejudice can result to it by the present action. Moreover, as above indicated, an allotment estate be-

ginning in 1927, with a restriction upon alienation thereof until 1952, is not the same estate as an allotment of the same area made in 1923, with a restriction upon alienation terminating in 1948. Besides, four years of rents, issues and profits under the present action were not involved, and could not have been involved, in the prior action. In other words, the terms of the estates of appellants under the two sets of proceedings are different.

Not only is the estate in the lands as of 1923 a different estate and tenure than was involved in the proceedings had in 1927, but appellants have a vested undivided interest in the lands aside from the allotment proceedings here involved. Have they lost this right too by the former judgment? The United States asserted no estate in the lands in itself. The former decree, as to the United States, does nothing more than confirm in it a policy that has since been declared erroneous in the *Arenas* case. The United States neither sought nor could have obtained affirmative relief. The relief granted was only negative in character. Where such negative relief rests solely on a matter of policy that has since been declared erroneous, if not illegal, it should not, and we believe cannot, operate to deprive these Indians of a vested right.

Furthermore, under the facts set up in the motion for summary judgment herein, other members of the Tribe are favored over appellants, and the value of the improvements placed by appellants on the lands allotted to them becomes the common property of the Tribe with resultant great and irreparable detriment to appellants.

II.

The United States Is Estopped to Plead Res Judicata.

Practically all of the points advanced under topic No. I are applicable here. The doctrine of estoppel *in pais* should apply to the United States under the facts here present. It has no proprietary or vested interests in the Mission Indian lands. The title to the unallotted lands is in the Tribe. The United States has only a trusteeship, sometimes called a guardianship, over the Indians and their lands. It is its duty to protect them, and, where an individual has rights peculiar to himself, it is likewise its duty to protect such rights, even against the remaining members of the Tribe.

It would be unjust and inequitable in the extreme for Lee Arenas to have his allotment validated and the Hatchitts, under the same allotment proceeding, have their allotments declared illegal.

The only interest the United States could have in opposing the plaintiffs in this case is to continue to assert a policy that was declared erroneous, if not illegal, by the Supreme Court of the United States in the *Arenas* case.

When these allotments were legally made, it became and remains the duty of the United States to protect the individual Indians in the enjoyment of their respective claims. The duty to the Tribe as a whole at this point becomes subordinate to the rights of the allottees. The United States cannot benefit either the Tribe or the allottees by urging the doctrine of *res judicata* in this case and for this reason the rule of estoppel should be applied. The present actions are test cases for practically all of the allottees mentioned in the so-called *St. Marie* case judgments.

Appellee's contention that "The United States is not estopped to plead *res judicata*" (Br. pp. 7-9), as applied to the facts pleaded in the Complaint, is not supported by the cases cited. As stated in the opening brief (p. 23) "The United States is not to be estopped when acting in the capacity of a sovereign." In each of the three cases cited by appellee (*Cherokee Nation v. United States*, 270 U. S. 476, 486; *Klamath Indians v. United States*, 296 U. S. 244; *United States v. Klamath Indians*, 304 U. S. 119) the claim or right involved arose out of a treaty between the Indians and the United States. The making of treaties by the United States is an exercise of its sovereign power. (Article II, Section 2, par. 2, Constitution of the United States.) The sovereign cannot be sued without its consent, which, of course, requires the enactment of a statute consenting to suit. These principles fully explain the decisions of the Supreme Court in the cited cases, *supra*, and distinguish them from the case at bar.

The decision of the Supreme Court in *United States v. Shoshone Tribe of Indians*, 304 U. S. 111, 58 S. Ct. 794, 82 L. Ed. 1213, does not sustain appellee's contention "that in this type of case the Government's relation to the Indians is that of a sovereign." (Br. p. 9.) In that case the Supreme Court clearly indicated the relationship of the United States with the Shoshone Indians as follows:

" . . . Although the United States always had legal title to the land (all reservation land) and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate

to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, *not the exercise of guardianship or management*, but confiscation." (pp. 115, 116, 304 U. S.; Italics ours.)

And at page 117, the Court said:

"As transactions between a *guardian and his wards* are to be construed favorably to the latter, doubts, if there were any, as to ownership of the lands, minerals, or timber would be resolved in favor of the tribe." (Italics ours.)

To excuse its dereliction of duty appellee condemns appellants' argument as "moralistic," and in the next sentence (Br. p. 8) says "The paramount Governmental duty here is to protect the interests of all the Palm Springs Indians . . ." The statement would be more effective if the Government's conduct over a period of many years had conformed to the statement. A few facts are in order. From the passage of the Mission Indian Act in 1891 to 1917, the Government did nothing whatever to secure to appellants and others similarly situated allotments in severalty in the tribal lands. In 1917, Congress commanded action, directing the Secretary to cause allotments to be made to the Indians on the Mission Reservations. (Act of 1917; *Arenas v. United States*, 322 U. S. 426.) Four years later the Secretary appointed an Allotting Agent. Two years thereafter, the Allotting Agent completed the making of allotments to all members of the Palm Spring Band. Then four more years elapsed without further action. The Agent then made reallotments to such members of the Band as made selections for allotment. Then the Government waited seventeen more years,

when, on December 14, 1914, the Secretary awoke from his long sleep and disapproved all allotments made in 1927. Such a course of conduct does not justify the smug assumption that the Government has been performing its "paramount Governmental duty," nor does such conduct invite confidence that there will be prompt performance of such duty in the future. Meanwhile, as to all of the older members of the Band, performance of such duty, because of death of such members, will become unnecessary.

III.

The Doctrine of Equitable Estoppel May Be Asserted Against the United States in This Suit.

Appellee refers to the argument on estoppel made in its opening brief in the *Arenas* case (Br. pp. 29-34) and adopts that argument in this case. Appellee cites only two cases (*Utah Power & Light Co. v. United States*, 243 U. S. 389; *Yuma Water Ass'n v. Schlecht*, 262 U. S. 138) in support of its position. Those cases are not in point here, as stated in our opening brief (pp. 23, 24) and are clearly distinguishable from the case at bar.

In *Utah Power & Light Co. v. United States*, 243 U. S. 389, 37 S. Ct. 387, 61 L. Ed. 791, *supra*, the Power Company contended that the United States was estopped to question its right to use public lands as sites for works employed in generating and distributing electric power because agents in the forestry service and other government offices, with knowledge of what the power companies were doing, did not object and impliedly acquiesced therein until the works were completed and put into operation. The

Supreme Court, in answer to this contention, said, at p. 391 (37 S. Ct.):

“Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done *what the law does not sanction or permit*. (Citing cases.)” (Italics ours.)

In *Yuma County Water Users' Ass'n v. Schlecht*, 261 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909, *supra*, plaintiffs brought suit to enjoin the defendants, who were officials of the Reclamation Service, from putting into operation the determination of the Secretary of the Interior that the construction cost of the irrigation project involved was \$75 per acre. The plaintiffs contended that the report of consulting engineers, a letter from the Director of the Geological Survey, correspondence between officials of the Service and Association, and other statements, showed that the construction cost to the users would not exceed \$35.28 per acre. In this connection the Supreme Court said, at p. 500 (43 S. Ct.):

“Prior to the making of the construction contracts, opinions expressed by engineers or officials may be estimates in one sense; but they are tentative and preliminary, and cannot be regarded as constituting the required statutory estimate, though contributing to the basic facts upon which it is made. (Citing cases.) The statute contemplates a precise and formal public notice which must state the lands irrigable under the project, the limit of area for each entry, *the charge to be made per acre*, the number of annual installments and the time when the payments shall commence. *The opinions, correspondence, and statements relied upon do not fulfill the statutory requirements*, and we must hold that the government is

neither bound nor estopped by them. (Citing cases.) Moreover, the contract of 1906, made subsequently, expressly provides for payment on the part of the water users 'for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders.' Plainly this looked forward to future action on his part, and did not rest upon any action already taken." (Italics ours.)

It is clear that the Supreme Court based its decision in the two cases quoted from, *supra*, upon the ground that the United States may not be estopped by the *unauthorized* acts of its officers and agents, and those decisions decided nothing more in reference to estoppel. It is also clear that those decisions have no application to the case at bar, since here the Secretary of the Interior and the Alloting Agent were authorized by the several Acts of Congress pleaded and relied upon to do the acts and make the representations, statements, and promises constituting grounds for the estoppel here invoked.

Conclusion.

Wherefore, appellants pray that the judgments herein be reversed and that these causes be remanded to the District Court for trial on the issues made by the complaints and answers of the parties.

Respectfully submitted,

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Attorneys for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Appellant,

vs.

WALTER McDONALD,
Appellee.

WALTER McDONALD,
Appellant,
vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
FEB 2 1946

PAUL P. O'BRIEN,
CLERK

No. 11210

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In the United States District Court for the Northern
District of California, Southern Division

C. A. No. 24885-S

In the Matter of

WALTER McDONALD,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden United States
Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Walter McDonald respectfully
shows:

That he is illegally restrained of his lawful liberty
by color of authority of the United States and in the
immediate custody of James A. Johnston, Warden
of the United States Penitentiary, Alcatraz, Cali-
fornia, which penitentiary is within the legal juris-
diction of this court.

STATEMENT OF FACT

Petitioner, on May 4, 1938, in the United States
District Court for the Eastern District of Michigan,
was indicted on six counts for violation of Title 12,
Section 588B, subsections (a) and (b); all of which
comprise a single charge of bank robbery.

On January 25, 1939, petitioner was tried by
jury and found guilty. On January 26, 1939, he

was sentenced to the penitentiary in the custody of the Attorney General of the United States and to this day stands committed.

CONTENTION OF PETITIONER

That petitioner was deprived of his constitutional right to the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner is falsely, erroneously and unjustly charged with a very serious offense of which he is wholly innocent. Being ignorant in law and, during his trial, deprived of his constitutional right to the assistance of counsel, which necessarily precluded the right of appeal, petitioner was unable to establish his innocence.

Petitioner was notified by the court on Monday evening January 23, 1939, that his trial would start the following morning. He had no funds to employ counsel and the court would not appoint counsel; in support of which is an authentic copy of a letter incorporated within a sworn deposition by Honorable Judge Moinet, on page 13 thereof, attached hereto, made a part hereof, and marked petitioner's exhibit A.

On the evening preceeding his trial petitioner learned that one Attorney George F. Curran had filed with the Court Clerk his notice of appearance as defense counsel on [2*] January 10, 1939. This

*Page numbering appearing at foot of page of original certified Transcript of Record.

was without the consent, knowledge or notification of petitioner; in support of which is an authentic copy of a sworn deposition by Attorney George F. Curran, at line 30, on page 14 thereof, attached hereto, made a part hereof, and marked petitioner's exhibit C.

Petitioner thought at the time that the court had appointed this attorney to defend him. He promptly requested him to withdraw from the case. This the said attorney refused to do. Ex. C., p. 15, line 12.

The following morning January 26, 1939, when court convened Atty. Curran made a motion for a continuance so that he could prepare a defense; for at no time preceding the trial date had this said attorney notified or consulted with petitioner in an effort to prepare a proper structure of defense. This motion the court denied. Ex. C. p. 15, lines 21 to 26.

Whereupon petitioner arose and personally requested Judge Moinet in open court for other and unprejudiced counsel. Ex. A. p. 3, line 24; Ex. C, p. 7, line 24: Ex. C. p. 20, line 28. He explained that this attorney, at that instant, was awaiting trial before the grievance committee of the Michigan State Bar, Ex. B, for professional misconduct; and that petitioner was the prosecuting witness. Ex. C, p. 14, line 12.

This urgent request the court denied, Ex. C, p. 15, line 17, compelling petitioner to proceed to trial

with his personal enemy simulating a defender and without having made any preparation whatsoever for a defense. Ex. C, page 15. lines 21 to 26.

CONCLUSION

Petitioner having been denied the Assistance of counsel for his defense in contravention of Amendment Six, United States Constitution, the trial court lost legal jurisdiction, of said cause by reason thereof, during the proceedings. Therefore the judgment of conviction is invalid, void and of no effect, and petitioner is now unlawfully deprived of his liberty.

PRAYER

Wherefore, petitioner prays this Honorable Court for a writ of habeas corpus to the respondent herein, Warden James A. Johnston, commending him to release petitioner forthwith from further unlawful custody. And petitioner will ever pray.

WALTER McDONALD

Petitioner Pro Se

AFFIDAVIT OF VERIFICATION

Personally appeared before me Walter McDonald who, after being first duly sworn, upon his oath deposes and says, that he is the petitioner in the above entitled cause; that he has read the contents

thereof; and that they are true to the best of his knowledge and belief. [3]

(Signed) WALTER McDONALD

Affiant and Petitioner

Subscribed and sworn to before me this 4 day of June 1945.

(Signed) E. J. MILLER,

Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden—Associate Warden authorized by the Act of February 11, 1930, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Walter McDonald Is a Citizen of the United States. [4]

EXHIBIT A

The Deposition of the Honorable Edward J. Moinet, United States District Judge, Eastern District of Michigan, Southern Division, taken on behalf of the Respondent, pursuant to attached agreement, before A. W. Estabrook, shorthand reporter, and Malcolm Shaw, Deputy Clerk of the Court, duly authorized and empowered to administer oaths, on Thursday, June 26, 1941, at three o'clock P. M., in the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, appearing on behalf of Respondent. [5]

Exhibit "A"—(Continued)

EDWARD J. MOINET,

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Deputy Clerk of the Court, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name, please?

A. Edward J. Moinet.

Q. Where do you reside?

A. Detroit, Michigan.

Q. What is your occupation and profession?

A. United States District Judge for the Eastern District of Michigan.

Q. How long have you been United States District Judge for the Eastern District?

A. Since June 13, 1927.

Q. And at the present time you are District Judge of that district?

A. I am one of the five.

Q. Judge, do you recall the cases of Otto Barnowski and Walter McDonald, which were tried in 1939 in your Court, wherein Barnowski and McDonald were charged with violation of the law, with robbery of National Banks?

A. What is the question, do I recall?

Q. Do you recall it?

A. I do; the case was tried before me.

Q. Judge, is it your custom to take notice of

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the various cases that you try, your own personal notes? A. I do.

Q. And you have those notes here with you, do you, Judge? A. I have.

Q. Judge, without asking you detailed questions about the case, I would like to have you state in the record what your notes show in connection with the case, generally.

A. My notes show the title of the cause, and the number, and the attorneys, United States attorneys appearing for the Government and [6] the attorney appearing for the defendants; the drawing of a jury, and the number of challenges and the names of the jurors excused; the opening statement of counsel for the Government and the opening statement of counsel for defendants; and the names of all of the witnesses sworn by the Government and for the defendants, and notes of their evidence as given.

Q. Now, Judge, do you recall, on the opening day of the trial, do you recall whether or not an attorney named George F. Curran appeared on behalf of both these men in your Court?

A. I do, and the order showed that he had entered his appearance, right in the file, there, with the Clerk of the Court, as attorney for the defendants, for each defendant.

Q. Now, in connection with Mr. Curran being attorney for the two petitioners, who were the defendants in your Court on the opening morning of

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the trial, was any request made to you, Judge, by either McDonald or Barnowski, that you appoint new counsel for them? A. There was not.

Q. Was there any request made by Barnowski or McDonald or by Curran their lawyer, that you continue the case on that morning, a formal request?

A. No.

Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake not, the jury was drawn and sworn, McDonald said that he had some little disagreement with his attorney.

Q. Did he state the nature of that disagreement?

A. He did not; and the Court waited for some time for him to advise the Court of the nature of the difficulty. Mr. Curran said nothing and nothing further was said by McDonald or Barnowski in reference to the particular subject.

Q. So that you were never informed that morning, or at any subsequent time, as to what the nature of the alleged difficulties between Barnowski and McDonald and their counsel was?

A. I was not. [7]

Q. Had anything been said in the Court that morning by McDonald or Curran, his attorney, to the effect that McDonald and Barnowski had filed any charges with the Bar or Bar Association of Michigan against their attorney, George Curran?

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

A. There was not; and I never heard of the subject until yesterday and that was from you and the United States Attorney who tried the case, Mr. Babcock.

Q. Now, Judge, I believe that prior to the day of the opening of the trial of Barnowski and McDonald in Michigan, they had also been arraigned before you some time prior to that on the complaint, due to the fact that, as I understand it, Mr. Hurd, the Commissioner, was out of the state and on sickness in Florida, is that right?

A. Yes.

Q. And at that time, the time they were arraigned on that complaint, did Mr. George Curran appear before you on that hearing?

A. He appeared before me serving as a Commissioner, and that was when, that was a long time before the trial, several months before the trial.

Q. You had had no complaint, no formal written request from either Barnowski or McDonald requesting the appointment of counsel, had you, at any time?

A. I had not.

Q. Now, in connection with Mr. Barnowski, on the morning that the trial opened, did Mr. Barnowski make any statement whatever to you about his difficulties, or any difficulties with Mr. Curran?

A. He did not; there was no claim made that there was any difficulties between Barnowski and the counsel.

Q. So that I take it that on the morning of

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the trial, you had no personal knowledge or other information was furnished you by anybody to the effect that there was any personal difficulties between Barnowski and his counsel Curran?

A. No sir.

Q. And the only statement that was made in court in your presence as to any difficulties that McDonald had with Curran was, as you have already testified, the mere statement that there had been difficulties? [8]

A. Yes.

Q. No explanations were offered and no formal motion for continuance was asked at that time?

A. No.

Q. And no formal motion for appointment of new counsel was asked by either petitioner?

A. No, sir.

Q. Now, Judge Moinet, the petitioner having—

A. (Interposing). Well, wait a minute. There was no request ever made to this Court by either of the defendants or by their counsel that the government procure for them certain witnesses or subpoena and bring into Court certain witnesses. Also, Mr. Curran proceeded to try the case; the defendants swore and introduced the testimony of eight witnesses in their defense; that defense applied to both defendants as to their whereabouts upon the day in question, at or about the time it was alleged the bank was robbed, and the matter was thoroughly argued to the jury, both by the government and by the defendants' counsel Cur-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

ran; and so far as I am able to observe Mr. Curran tried this case in a very able manner, and seemed to use his very best efforts in presenting the defense for the defendants.

Q. And during the course and progress of this trial were any complaints made to you by either defendant as to the conduct of their counsel throughout the course of the trial?

A. There was not.

Q. Was there any information given you that the defendants requested that any witnesses be subpoenaed at the expense of the government?

A. There was not, and if they had made that request and shown their inability to procure such witnesses, I would have made an order that those witnesses be subpoenaed and presented in Court at the expense of the government.

Q. And if any information had been conveyed to you on the morning that Court opened in the trial of the case to the effect that either of these petitioners had personal difficulties with his counsel or had stated to the effect that they could not proceed with that counsel, would you have granted them a continuance or at least looked [9] into the matter with the idea of appointing new counsel for them?

A. If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and if I had been satisfied that their difficulties were of such a nature

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel.

Q. And as I take it from your testimony, there was nothing whatever that was said in the Court Room that morning, and no statement made by either petitioner or by their counsel that gave you any indication or idea that any such situation existed between them and counsel? A. No, sir.

Q. Judge Moinet, in the District of Kansas, McDonald testified in substance as follows:

He testified that on the opening of this case he arose in open court in the morning and stated in substance that he had had difficulties with his counsel. That you, in answer to that question, asked Mr. Babcock if Mr. Curran appeared formally as counsel. Mr. Babcock in reply to this question, stated that Mr. Curran had formally filed his appearance. Mr. McDonald further stated that on hearing Mr. Babcock say this, then you said, 'The trial will proceed.'

Mr. McDonald then says that upon your saying that the trial will proceed, that he, the petitioner McDonald, rose and said further, in substance, to you, that he had personal difficulties with his counsel, Mr. Curran, in that he had filed, he, McDonald, had filed charges with the State Bar Association of Michigan against Curran, and that he and Cur-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

ran—that Curran could not competently represent him, and he stated further that he then formally asked you to appoint other counsel.

Judge, did Walter McDonald make those statements to you in open court on the morning that the trial convened? [10]

A. He positively did not. The subject was never mentioned.

Q. And the first intimation you had of any such statement is my stating it to you here?

A. Today, yes, sir.

Mr. Davis: Judge Moinet, under stipulation filed in the District of Kansas in this case, McDonald, Barnowski, and their counsel appointed in Kansas, and myself, have stipulated that they might file written interrogatories, to be asked of you at the time this deposition was taken. I will ask you questions that they have forwarded to me in pursuance of the stipulation.

Cross Examination

(Interrogatories Read by Mr. Davis.)

Q. Did you receive a letter or letters from defendants McDonald and Barnowski in cause Number 24742? A. Yes.

Q. State in detail the contents.

Mr. Davis: The Government suggests that copies of the letters which you state you have received

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

be made under your supervision and that such copies be attached to the deposition in lieu of the originals.

A. Yes. Well, here they are. (Papers to counsel) Let me say that on September 7, 1938, I received a letter from McDonald while he was confined in Milan jail, copy of which is attached.

On September 18, 1938, I received a letter from Barnowski while he was confined in Milan Jail. That was before the trial, September, 1938, a copy of which follows. On July 29, 1940, I received from Barnowski a letter from Leavenworth, Kansas, copy of which follows.

Mr. Davis: The three letters that you have mentioned and which—copies of which are now incorporated into the record, are those the only letters you have received from these petitioners, Judge?

A. They are.

Mr. Davis: The next question that the petitioners have in their list is this question:

Q. Is it true, as the court records attest, that over 125 cases were [11] given priority over case Number 24742?

A. I don't know as to the specific number. I know that there were many criminal cases pending and many more were accumulating. These criminal cases were being tried as fast as it was possible to dispose of them according to the ordinary business of this court.

Mr. Davis: So that the interest of the public

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

as well as the interest of the defendants in these cases was taken into consideration by the court in disposing of the business, is that true?

A. It certainly was.

Q. Was any motion or formal pleading ever filed by either petitioner that ever came to your attention, Judge, in which they moved the Court for an immediate trial, that is, I am speaking of a formal pleading? A. No.

Q. No such pleading filed. The next question is in regard to the 125 cases. 'If so, do you approve of this preferential practice?'

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial; no proper foundation laid for the 'preferential practice' referred to in the question.

A. There was no preferential practice; the cases were taken up in their ordinary course.

Q. 'If not, why was it permitted?' The answer is already in. Seven. Did either defendant make a statement before sentence was imposed?

A. They did not. The records show that before sentence was imposed they were asked if they had anything to say before sentence was imposed, and they said nothing.

Q. If so, state in substance. You have already answered that. Were they given an opportunity to make a statement? A. They were.

Q. If not, why not. I think that is answered. Eight, is it true that defendant Barnowski wrote

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

you a letter from the Detention Farm in Milan, Michigan, requesting you to appoint counsel for them?

A. I received a letter from him, as already set forth, but he made no request to appoint counsel.

Q. Did you answer that letter?

A. I don't think I did. [12]

Q. If so, when? A. Well——

Q. Your answer was a foregone conclusion. If not, why not?

A. I referred those letters from Barnowski and from McDonald to Mr. Babcock, the Chief Assistant United States Attorney, and was advised by him that these cases would be taken up as soon as it was possible, having in mind the enormous number of cases then pending in this court, and cases prior to this case referred to.

Q. Next question: Is it true that you criticized a friend of said defendants for trying to bring their witnesses to court for them?

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial, no basis laid.

A. It is positively not true and I never knew and I don't know now that any friend brought any witnesses to court for the defendants. There were no requests to charge presented to the court on behalf of the defendants and the court gave a full and complete charge, as is usual in all criminal cases,

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

fully protecting the rights of the respondents upon trial.

Q. Judge Moinet, at the time or shortly prior to the time the case of Barnowski and McDonald was called for trial in your court had the court been engaged in a very extended case involving the Securities and Exchange Act?

A. Yes, I had been engaged in the trial of the Securities and Exchange case and it took up the time of this court for thirteen continuous weeks, a jury trial.

Q. And before that, Judge, had you been engaged in the trial of some litigation involving some drain proceedings? A. Yes.

Q. That were extensive in nature?

A. I have been engaged in different drain proceedings involving the validity of bonds in the sum of six or seven million dollars, in which proceedings the legality of which was challenged by the taxpayers and by the local municipal authorities, and these matters took up the time of the court for many weeks; of which some cases went to the Court of Appeals. [13]

Q. Now, during the extended occupation of the court with these matters, the court has just referred to, at various times had the court had informal discussions with members of the United States Attorney's Office relative to criminal cases that might be pending in the court? A. Yes.

Q. And among those informal conferences does

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the court recall whether or not it had ever been called to his attention that Barnowski and McDonald were anxious or stated that they were anxious or might indicate that they were anxious for an early disposition of their case?

A. Yes; in their letters that they wrote they indicated that they wanted a trial, but their principal contention was that they wanted to be discharged because they hadn't been provided with a speedy trial.

Q. And as I believe the court has already testified that on the morning of the trial there was no formal motion for a continuance nor for the appointment of counsel nor was anything said in the courtroom by either petitioner or by counsel for the petitioners that would give the court any indication or intimation that these petitioners had any difficulties, serious difficulties with their counsel that would not warrant their counsel proceeding with the case?

A. No, on the contrary, there was nothing said that would lead the court to believe that their trouble was of a serious nature and not only that, but the court observed upon the trial of the case that Mr. Curran, their attorney, tried it in a very masterful manner, as a good lawyer; he protected their rights and the examination, cross-examination, and argument to the jury indicated to me that he used his very best efforts on behalf of the defendants.

Q. And when Mr. McDonald arose and said

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

there had been some difficulties with counsel, that was the only statement that was made to the court in open court that morning?

A. It was, at any time, in or out of court.

Q. And the court did not have then, or does not have now, except what you have been told since then, any idea of what the difficulties between McDonald and counsel were?

A. I don't even know now what the difficulties were, or are. [14]

Q. I see. And you did not deny them the continuance because no continuance was asked for on the morning of the trial? A. No.

Mr. Davis: Thank you very much, judge. I think that is all I need to bother you with.

EDWARD J. MOINET.

Subscribed and sworn to before me this 23rd day of July, 1941.

MALCOLM SHAW,

Deputy Clerk U. S. District Court, Eastern Dist.
of Mich. [15]

(Copy)

Federal Building Detroit

September 18th, 1938.

From Otto Barnowski—5597

To Hon. Judge Moinet

Dear Sir:

I, an innocent man and a cripple, have been held at—Milan Detention Farm a period of six months for Bank Robbery.

Exhibit "A"—(Continued)

The witnesses in this case State positively that the robbers were not crippled. The evidence adduced by the—F.B.I. agents confirms this inescapable fact.

The United States District attorney possesses this indisputable evidence yet persistently and unreasonably refuses to grant my release or bring me to trial so that I may prove my innocence.

I understand it is the sole duty of the Court to set date for trial, appoint counsel where defendants are indigent, and otherwise supervise and protect the rights of that defendant when said person's rights are subject to be abused or disregarded.

I justly contend that my constitutional rights have been ruthlessly disregarded.

Therefore I appeal to the Court for instant relief from my unlawfully restraint.

I do not present this letter as a suppliant seeking undeserved preferment or favor—But respectfully request that you protect my rights, as you have pledged by your oath of office, and immediately release me or insist that I be given a trial.

Thus, Justice only I ask of you who has been appointed to dispense it, and whom I am sure, is broad enough to recognize the fairness of my request.

I trust that a reply will reach me at an early date.

I thank you.

Respectfully,

OTTO BARNOWSKI,

Box 1000—5597 Milan, Mich.

Exhibit "A"—(Continued)

(Copy)

September 7, 1938.

Federal Bldg.

From W. McDonald,
Box 1000—5593, Milan, Mich.

Dear Sir:

I was arrested Mar. 28, for Bank Robbery. Of this crime I am innocent.

On May 18, the F.B.I. investigator visited me at Milan. He stated that I should look forward to favorable action within about two weeks. That was over three months ago.

I would thank you for an immediate interview so that you may advise me what to do to gain my release.

It is with great reluctance that I burden you with my individual problems. But I have no funds to employ counsel and no knowledge how to proceed in my present dilemma.

I thank you sincerely for any courtesy you may be pleased to extend.

Respectfully,

WALTER McDONALD. [17]

Exhibit "A"—(Continued)

(Copy)

Leavenworth, Kansas,

July 29, 1940.

Post Office Box 7
Hon. Edward Moinet
Federal Bldg.
Detroit, Michigan.

My dear Judge:

Doubtless you will be surprised at receiving this letter from me, or my assuming the privilege to write but it being a matter of life and liberty to me, I beg of you to spare me enough of your valuable time and undivided attention, to present unquestionable facts furnished by competent Federal Doctors here at Leavenworth prison to more fully aid you in understanding my case more completely in my behalf, viewing it from an unbiased standpoint, as it has not been correctly presented to you to this date.

I am certain "your honor" is too intelligent to be biased, too powerful to be intimidated, too honest to be corrupted, too sincere to be haphazard and too fair to without the truth.

I am very sure you will be more than glad to listen to my plea if you had the least idea I could show you unquestionably that I am innocent of the crime for which I am sentenced. I know I am innocent of the crime, and am sure you will feel better to have all the facts upon which I rely, which I

Exhibit "A"—(Continued)

am now able to produce from the most convincing and the most reliable source.

I shall be glad to have you consider the facts as follow:

You will recall from the facts of the trial, that my conviction was based upon identification made by a lady school teacher who happened to be a customer in the bank at the time of the robbery—All the officials and employers of the bank testified the robbers were masked and this one lady said they were not, and all witnesses including this lady testified that neither of the robbers was crippled.

You will also recall the testimony of the physician Dr. Shallow who furnished evidence of my physical condition. In my opinion it was [18] the testimony of this lady teacher, and the Doctor which caused my conviction.

I can furnish you unquestioned and competent facts by the highest class and most competent physicians in Leavenworth prison, who have stripped me, and fully examined me to their satisfaction, which facts will controvert fully the testimony of both the above mentioned witnesses. If I can do this, I will strip the whole case of all incriminating evidence against me. If these witnesses for any reason gave untrue testimony then I most assuredly should not be deprived of my liberty and freedom, and should go free.

Dr. Shallow who testified in the case regarding my physical condition among other things said I had action in my crippled knee. Absolutely, upon

Exhibit "A"—(Continued)

my word and honor, did not at any time examine me in any manner sufficient to know whether I was crippled or not. My crippled condition is such that I am unable to go to meals and walk in the lines with other inmates, but I am required to enter alone in advance of the others, and to leave in advance of the others.

The rules of this institution will not permit the Doctors to give me written statements, but they advise me that they will gladly give you a full report upon your written request.

If my condition is such that I could not have walked in and out of the bank without anyone noticing it, then the ladies identification must be a gross mistake even how honest she may be in her intentions.

Now Your Honor: I am imploring you, as a dependant citizen of this great and good Government, and as a man who has his freedom taken from him on mistaken identity and erroneous testimony to present to your authentic and unimpeachable statement of the facts regarding my crippled condition, as found by the best legal medical talent in the employ of the Government in Leavenworth prison. It is not new facts discovered, but true facts of which it is my first and only opportunity I have had to furnish in my behalf.

Now, your Honor: I am asking you to please reconsider my case, and in the face of these facts, I ask that you reform your judgment in keeping with this correctly derived at facts, which proves

Exhibit "A"—(Continued)

beyond a reasonable doubt, that Dr. Shallow did not examine me sufficiently to [19] determine my actual condition, and that the lady who identified me, must of necessity, be mistaken entirely in her testimony as affecting my guilt. I am sure my Government through its public servants desires me to have administered to me equal and full justice as the true facts justify, regardless of the time or under the circumstances which same is developed and presented. This being a matter of full life and liberty to me, I truly ask and pray you to communicate with the following named physicians at the U. S. penitentiary at Leavenworth, Kansas, regarding my condition as a cripple.

No time in the past ten years or more have I been able to walk without crutches or a strong walking stick as an aid to support me.

You write to Dr. John W. Cronin and Dr. Root, physicians in the hospital here. I have been advised by officials here to first write direct to you as you have full power as trial judge to reconsider my case and reform your judgment in keeping with the facts presented to you.

This will be consistant with what law and justice require.

I am yours for success and happiness.

OTTO BARNOWSKI,

54616, Leavenworth, Kansas.

P. S. Please excuse pencil, as I am not permitted to use a typewriter. [20]

Exhibit "A"—(Continued)

State of Michigan,

County of Wayne—ss.

CERTIFICATE OF COURT STENOGRAPHER

I, A. W. Estabrook, a Court Stenographer in the County and State aforesaid, do hereby certify that the witness Edward J. Moinet, whose deposition was taken before me on behalf of Robert H. Hudspeth, Warden United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Thursday, June 26, 1941, at the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan, was by the Deputy Clerk of the Court first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said deposition then given by said witness was by me reduced to writing, and when completed, the said deposition was read over by him, the said witness, and subscribed by him in my presence, and that the said deposition is a true and correct transcript of the whole of the testimony so given by the said witness as aforesaid.

I do further certify that the said deposition hereto attached was taken at the time and place mentioned and described in the caption and notice contained in said deposition, and in the notice of said deposition which is hereto attached; and that said deposition was taken for the reason that the

Exhibit "A"—(Continued)

said witness lives at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the deposition aforesaid to the said Court with my own hand, I have sealed up the same, and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said deposition has been retained in my possession since the taking thereof, and until the same was sealed up by me and delivered to said Court by United States mail as aforesaid.

I do further certify that the respondent, Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time of the taking of the said deposition by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division, [21] that the petitioners were not represented by counsel nor present at the time of the taking of the said deposition.

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

A. W. ESTABROOK,
Court Stenographer, 733 Majestic Building, Detroit, Michigan.

Detroit, Michigan, July 24, 1941.

Exhibit "A"—(Continued)

CERTIFICATE OF DEPUTY CLERK

State of Michigan,
County of Wayne—ss.

I, Malcolm Shaw, do hereby certify that I am a deputy Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division, and am duly authorized and empowered to administer oaths.

I further certify that on Thursday, June 26, 1941, at three o'clock P.M., in the office of the Honorable Edward J. Moinet, District Judge, Federal Building, Detroit, Michigan, personally appeared before me the said Honorable Edward J. Moinet, a witness produced on behalf of the respondent in the foregoing entitled cause; that the said witness was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause aforesaid; that the testimony then given by the said witness was reduced to writing in the presence of said witness by A. W. Estabrook, a competent court stenographer; that the said testimony was then transcribed by the said A. W. Estabrook, and the foregoing and attached twenty-five (25) typewritten sheets constitute a full, true and correct transcript of the testimony so given by the said witness as aforesaid.

I further certify that after the said testimony had been so transcribed, the same was read over by the said witness who did then and there subscribe and again make oath to the same in my presence. [22]

Exhibit "A"—(Continued)

I further certify that I am not counsel for nor related to any of the parties to the foregoing and entitled cause, neither am I interested in the subject-matter or outcome thereof.

MALCOLM SHAW,

Deputy Clerk, United States District Court for
the Eastern District of Michigan, Southern
Division.

Dated at Detroit, Michigan, July, 1941.

[Endorsed]: Filed July 31, 1941. Howard F.
McCue, Clerk. [23]

EXHIBIT "B"

State Bar of Michigan
General Headquarters
Lansing, Michigan

April 28, 1945.

Mr. Walter McDonald,
Box No. P. M. B. 602,
Alcatraz, California.

Dear Sir:

We have your letter of April 20, and wish to inform you that your complaint against Mr. George F. Curran was filed with this office on November 19, 1938.

The Complaint was heard on March 10, 1939 and the same dismissed.

Yours very truly,
STATE BAR OF MICHIGAN.

By ERNEST WUNSCH,
Secretary of Grievances,
Third Judicial District.

EXHIBIT "C"

The Depositions of George F. Curran and John W. Babcock, taken on behalf of the Respondent, pursuant to attached agreement, before Eugene Karst, a Notary Public within and for the County of Wayne and State of Michigan, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, Appearing on behalf of Respondent. [25]

GEORGE F. CURRAN

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please?

A. My name is George F. Curran.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Where do you reside, Mr. Curran?

A. My residence, 3471 Courville Avenue, Detroit, Michigan.

Q. What is your business or profession?

A. I am an attorney, licensed to practice in the State of Michigan.

Q. And do you have offices in the City of Detroit?

A. My office is located at 1701 Ford Building, in the City of Detroit.

Q. And how long have you been admitted to the Bar of Michigan?

A. I have been admitted to the Bar of Michigan since August—no, since September of 1922.

Q. And you are a member of the Bar of the Supreme Court of Michigan? A. I am.

Q. And of what other courts are you a member admitted to practice in?

A. I am admitted to practice in the District Court, United States District Court.

Q. For the District of Michigan?

A. Southern Division; I was admitted in the Southern Division of the Eastern District.

Q. Do you recall the case of Walter McDonald and Otto Barnowski, which was filed in the United States District Court, the Eastern District of Michigan, No. 24,742? A. I do.

Q. Mr. Curran, when did you first know either Barnowski or McDonald—meet them?

A. I first met McDonald approximately a year

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

before they were arrested—I knew McDonald approximately a year before he was arrested on this charge. The charge I am speaking of is the robbery of the Farmington Bank. [26]

Q. And had you ever acted as his attorney prior to the bank robbery charge? A. I had.

Q. On more than one occasion?

A. On two prior occasions.

Q. On two prior occasions; and had you met—when did you first meet Barnowski, if you recall, to the best of your recollection?

A. I am not so sure, but I believe it was just prior to the issuance of the warrant in that Farmington Bank robbery.

Q. Just prior to that time. And were you employed by McDonald and Barnowski to represent them on the bank robbery charges in this district?

A. You refer to the case that was tried?

Q. I refer to the case. I will withdraw the question and ask you this question: Mr. Curran, will you state in your own words your employment by McDonald and Barnowski, and the steps you took in their case, from the first?

A. I was called and advised that Mr. McDonald was in custody of the Detroit Police Department. I contacted Mr. McDonald and arranged, or tried to arrange for his release. He was finally turned over to the Federal authorities on this robbery of the Farmington Bank. During that time I had

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

contact with Mr. McDonald and I appeared at the arraignment before Judge Moinet for him.

Q. At McDonald's request?

A. Yes. He also informed me that a friend of his, Otto Barnowski, had been arrested, and I proceeded to try and effect Barnowski's release. However, the police officers—I believe it was the State Police, Michigan State Police—took Otto Barnowski from the Detroit Police Department out to the Oakland County Jail at Pontiac. And there Barnowski called me through an attorney, Mr. Wilson. He had retained Mr. Wilson to get a writ of habeas corpus for him, and he also wanted me to come out there. I made two trips to Pontiac at Mr. Barnowski's request and filed—when they were just about to release him, some woman identified Barnowski and he was brought down and arraigned on the warrant in this Farmington robbery. I appeared at the arraignment [27] in the Federal Court for him on that matter, which also I believe was before Judge Moinet.

Q. At his request?

A. At his request. I was not paid, and I dropped out of the picture; and when the case came up for trial before Judge Moinet, there was some question as to Barnowski and McDonald wanting me to appear for them.

Q. Now, pardon me, but prior to the date of the trial—we will go back to that—did you make a trip to Milan, the detention farm at Milan, to see Bar-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

nowski and McDonald, prior to the time they were tried in the Federal Court here? A. I did.

Q. Will you state the circumstances relating to that trip and the purpose of that trip?

A. I received a telegram from Walter McDonald, who was then held at Milan, Michigan, the detention farm. Mr. McDonald, in his telegram, stated to me that if I would come out there he would pay me for my trip out there. I went out there and he paid me \$25 for the trip and to apply on past services. The purpose of Mr. McDonald wanting me to come out there was to try and effect an early trial of his case. He had been in custody some months at that time. He wanted me to secure a writ of habeas corpus, and so that he could receive an early trial I came in and I talked with Judge Moinet and also the District Attorney, and was advised that there were other cases, that had been pending prior to McDonald's and Barnowski's case, ahead of us, and just as soon as their case could be reached it would be tried, which they estimated at that time, I believe, was around thirty days. So I didn't secure a writ of habeas corpus, as Mr. McDonald and Barnowski wanted, because I could see as it would serve no purpose.

Q. Mr. Curran, both Mr. McDonald and Mr. Barnowski have testified in this case in Kansas, and both petitioners, in their testimony and in their petition for the writ of habeas corpus herein state in substance that the \$25 they paid you on that oc-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

case was for the purpose solely of filing a writ of habeas corpus and was not for the purpose [28] of paying your expenses out to Milan and back, or for past services. What is the fact? What was the \$25 for, Mr. Curran?

A. The \$25 was paid for services that had been rendered and also for the trip. I have the telegram, I believe, still in my files, showing that they agreed to pay me if I would come out to Milan.

Q. If you would come out to Milan?

A. Now, I received no other compensation except the \$25 for my trip to Milan—my expenses to Milan, which took a good half day.

Q. Mr. Curran, if you should be able to find that telegram in your files upon your return to your office, would you forward it to the reporter so it could be attached as Government's Exhibit 1 in this deposition?

A. I am sure I will be able to find it, and I will be glad to give it to you.

Q. Now, Mr. Curran——

A. Wait just a minute. Off the record——

(Discussion off the record.)

A. I am furnishing this on the basis that it is understood that that is not confidential communication between attorney and client, but if the Court who will pass upon these depositions should decide that it is, then it can be stricken.

Q. All right; fine. That is a good way to put it. Now, Mr. Curran, when you were at Milan, and in

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

addition to discussing the habeas corpus case or the early trial of their case, did you have an understanding with McDonald and Barnowski that you would represent them when they were tried, or did they question your representing them when they were tried?

A. Well, it was understood—I can't give you—

Q. What was your understanding of the matter?

A. It was my understanding that I was to try the case, and because of the fact that I had started on the case I was not going to let them down merely because I hadn't been paid.

Q. And did you assume, from the fact that they had wired you to come to Milan and paid your expenses for coming and going, that you were still representing them? A. I did. [29]

Q. Now, did you visit them at Milan on more than one occasion, Mr. Curran?

A. Well, now, I wouldn't say. I remember twice that I was out there, but I wouldn't say I was there three times or not.

Q. Your best recollection is you were there on two occasions?

A. Two occasions, and I may have been there three times; I wouldn't say. Of course, if the records are there, why, that is right.

Q. Yes, I appreciate that. In your appearing for McDonald and Barnowski at the arraignment and on the proceedings up to this point, had you

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

discussed their case generally with them as a lawyer would with prospective clients, or clients, and discussed the merits of their defense, and so forth?

A. We had discussed the case in a general way; we hadn't gone into details as to witnesses who might be obtained. Their contention, of course, was there was not much to discuss, that they knew nothing about the robbery, and that is why I say it was discussed just in a general way, their defense.

Q. Now, Mr. Curran, when did you see these men next; that is, prior to the day they were tried? I believe the trial started in January of 1939. Did you see them, shortly before the trial convened, at the County Jail?

A. I think I saw them a day or two before the trial convened, at the county jail.

Q. And will you state what conversation or arrangements you had with them at that time?

A. Well, there was a little bit strained feeling between McDonald and myself at that time. We did not have an awful lot of conversation. I merely informed them that I would be in court the following day, as I had filed an appearance and would have to be there.

Q. And when you filed your formal appearance, Mr. Curran—I believe the record will show it was on January 10th, and I believe the trial convened on January 24th—when you filed that formal ap-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

pearance, was it your understanding that you were still acting as attorney for these two men?

A. It was my understanding that I was. While I hadn't been paid, I was willing to go through with it. I had gotten into the picture and I [30] was willing to see it through.

Q. Had you been notified by either Barnowski or McDonald at any time that they did not want your services?

A. The only time that there was any mention of that directly was in Judge Moinet's courtroom the morning of the trial.

Q. Now, before we get to that point, Mr. Curran, did you ask or discuss with Barnowski and McDonald, at the county jail, before they were tried, their case, as to what witnesses they wanted, and so forth, or was any discussion had along those lines?

A. There was some discussion in general: not as to what witnesses they wanted, but in the general discussion of their case. For example, they said they couldn't—in explaining they couldn't be guilty, they said that there was a woman who operated I believe a laundry, who would testify that at the time of the robbery that they were in the laundry, or one of them was, and then the other one was supposed to have been in a garage: but I don't believe the names of any particular people were mentioned. Places were mentioned more than names.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Now, at this time, when you talked to them in the county jail and had this discussion with them as you have related about their case, was anything said by either McDonald or Barnowski that they did not want you to represent them in the trial of the case?

A. I don't remember a thing in the county jail or prior to the trial being said to that effect.

Q. Now, Mr. Curran, state what you recall as to what conversation took place in the courtroom on the morning the trial convened.

A. On the morning the trial convened, I believed the first step was I asked for an adjournment and the Court refused to grant an adjournment. McDonald then got up and walked up to the Bench, and his conversation to the Court, or statement to the Court, was to the effect that there had been some differences between him and myself and that they had filed a complaint with the State Bar of Michigan based upon the fact that I had not obtained a writ of habeas corpus for them, which, as I said before, I didn't feel would have served any purpose, and that was the reason I didn't obtain it; and that they didn't wish me to proceed with the case. The Judge asked me if I had filed an [31] appearance and I stated I had, and the trial Judge stated that the trial would go on.

Q. Now, did you represent them throughout the trial, Mr. Curran? A. I did.

Q. Did you cause any subpoenas to be issued

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

for any witnesses in their behalf, or were any witnesses procured for them?

A. There were witnesses procured.

Q. At your instigation, or how were the witnesses procured, if you recall?

A. Well, that morning they gave me the names and addresses of three or four witnesses that they wanted, and I believe we were able to secure two of those witnesses, and the other witnesses that appeared for them appeared voluntarily.

Q. And did you argue the case, at the conclusion of the case, in their behalf? A. I did.

Q. And after the trial of the case, were you present at the time they were sentenced, if you recall? A. No, I was not.

Q. You were not. Did you file a motion for a new trial for them? A. I did.

Q. Did you argue that motion? A. I did.

Q. Did you consult with them in regard to the filing of a motion for new trial, Mr. Curran?

A. I did.

Q. And after the motion for a new trial was overruled, did you take any steps to perfect an appeal? A. No, I did not.

Q. You did not. Did you have any discussion with Barnowski or McDonald in regard to an appeal?

A. Well, there was some discussion as to appealing, but it was based upon the fact that Barnow-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

ski's relatives would advance the cost and fee for the appeal, which they never did. [32]

Q. Now, I might state, Mr. Curran, that Barnowski has testified in the case in Kansas to the effect that you secured the sum of one hundred dollars from his mother, for the purposes of perfecting an appeal. What are the facts in that regard?

A. That sum of money was paid me for the purpose of filing a motion for a new trial, and the receipt that was given to Barnowski—Barnowski's brother, I believe—will so show.

Q. Mr. Curran, had you been paid any other money for your services in defending these men in the trial?

A. Outside of the \$25 which I was paid for my trip to Milan, and the hundred dollars which was paid for the motion for a new trial, I received no compensation whatsoever for any work done—the trial, consultation, any work—from Barnowski or McDonald, or anyone in their behalf.

Q. Mr. Curran, did you have any conversation with Mr. Babcock of the United States Attorney's office, or contact him in regard to securing an early trial for McDonald and Barnowski, at any time prior to the trial?

A. As I stated before, when I came back from Milan, I first checked up with the trial judge and also the District Attorney's office, Mr. Babcock, through Mr. Babcock, and it was Mr. Babcock's

(Deposition of George F. Curran.)

information that he was in the trial of a case at that time, criminal trial, that was pending before the Barnowski and McDonald case was pending, and there was one other case, I believe, that he had to try before the McDonald and Barnowski case was to be tried, and immediately upon the conclusion of that case, he would try the McDonald and Barnowski case.

Q. You recall whether or not the case Mr. Babcock referred to was the Securities & Exchange case that lasted some eleven weeks?

A. It was. There were a number of defendants—there were, oh, upwards of six to twelve defendants in that case. I was not interested in the case, but I know that there were a number of defendants in the case.

Q. Now, Mr. Curran, in regard to the charges filed with the Michigan Bar Association against you by McDonald, will you state what the facts are in regard to that and what disposition was made of that matter?

A. Well, I filed a return—or, rather, possibly I should say a statement, showing my side of the case, and the charges were dismissed by the State Bar Association. [33]

Q. Do you recall whether they were dismissed before the trial of the Barnowski case, or after the trial?

A. That I don't remember; I wouldn't say.

Q. Now, on the morning of the trial, when the

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

trial convened before Judge Moinet, was any formal motion for continuance filed in writing?

A. There was no formal motion for continuance.

Q. Was there any formal motion filed by the petitioners for other counsel?

A. No, no motion—formal motion, written motion—was filed by anyone that morning.

Q. And you had not discussed the matter of the charges filed against you by McDonald with them prior to going into the courtroom that morning, or they had not discussed it with you, is that correct?

A. That is right.

Q. And it was your—

A. (Interposing) In regard to your question whether those charges were dismissed by the Bar Association after the trial, I am certain now that it was after; I would almost say definitely it was after the trial of this case that that happened.

Q. I see. Now, in your representing these men in the trial of this case, Mr. Curran, did you give them the benefit of your best services, in accordance with your oath as a member of the Bar of the State of Michigan?

A. I did. There were, of course, investigations that could have been accomplished had we had any money to do it, but there was no money to do anything, and I didn't advance any money for these men; but as far as services rendered, I did everything I possibly could to give them the benefit of a fair trial.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. And do you have an opinion as to whether or not they had a fair trial in the courtroom?

A. It is a question of whether my viewpoint of the law coincides with the trial judge's. I may be wrong, and I wouldn't want to state on that.

Q. The matter you refer to in your answer is a question of interpretation of rulings of the Court on law?

A. Rulings of the Court on law. [34]

Q. But outside of the fact that the rulings did not perhaps agree with your conception of the law, were they granted a fair trial as to procedure and given a full opportunity to present their defense?

A. They were.

Mr. Davis: Now, Mr. Curran, the petitioners have filed a set of interrogatories or questions that they desire to ask of you, and I will ask those at this time. Off the record——

(Discussion off the record.)

Cross Examination

Q. The first question they desire to ask, Mr. Curran, is: Were you ever retained by McDonald or Barnowski to defend either or both of them in case No. 24,742?

A. I was never paid a retainer fee, but I was promised fees by the defendants, Barnowski and McDonald, which I was never paid, to represent them.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. The next question is: If so, when?

A. I think my previous answer answers that question.

Q. By whom?

A. I still think that that is answered by the first answer.

Q. What was the agreement?

A. When I was first called by Mr. McDonald, we discussed not my representing them so much as effecting their release, because it was their contention at first that they were not guilty, and consequently they didn't anticipate a warrant being issued.

Q. What was your fee?

A. I have received no fee.

Q. When were you paid?

A. I was not paid at any time outside of the \$25 for the trip to Milan and the hundred dollars for the filing of the motion for a new trial.

Q. If you were not hired by either defendant, did the Court appoint you as counsel for either or both of said defendants in cause No. 24,742?

A. No, the Court did not appoint me.

Q. If so, by what Judge were you appointed? That is already answered, I take it.

A. Yes. [35]

Q. On what date? That is already answered.

A. Yes.

Q. Did you represent either or both defendants when arraigned on their warrant? A. I did.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. If so, whom did you represent?

A. Otto Barnowski and Walter McDonald.

Q. On what date?

A. That I can't give you. I would have to consult the court file showing the date of the arraignment, which I believe were both held before Judge Moinet. Walter McDonald was arraigned approximately a week prior to the date of the arraignment of Otto Barnowski.

Q. Were said defendants given a hearing or examination before Commissioner Stanley Hurd?

A. They were not, because they were scheduled to have an examination, but the day before the examination the District Attorney presented the facts to the United States Grand Jury and an indictment was returned, which obviated the necessity of an examination.

Q. Did you represent said defendants when arraigned on indictment 24,742?

A. At this time I can't tell you whether I was present in the court at that time or not.

Q. Was the indictment read?

A. That I don't remember.

Q. Were you requested to interview either of said defendants in the United States detention farm at Milan, Michigan?

A. I was.

Q. Did you interview them?

A. I did.

Q. On what date?

A. I can't give you the exact date at this time. I would think it was somewhere in the neighbor-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

hood of October or November of—what year was that?

Q. 1938. A. 1938.

Q. Is it true that Warden Ryan interviewed you immediately after your [36] arrival?

A. No. I interviewed Warden Ryan because of certain accusations that were made by the prisoners as to their treatment in the prison.

Q. Is it true that Warden Ryan instructed you to warn McDonald and Barnowski that they better not get convicted or it will be too bad for them?

A. There was some discussion by the Warden that they had not been very good prisoners, and that in the event that they were convicted they could not expect the best treatment, or some such statement to that effect.

Q. State exactly of what said defendants consulted you during said interview?

A. Both defendants consulted me during that interview.

Q. Did you make any agreement with said defendants at that time? If so, of what nature?

A. That has been—I would rather answer that question because of the argument over this writ of habeas corpus, so it will be clear. We discussed the question at that time of why they were being held so long at the detention farm, and their claim was that the Government didn't have any case against them and didn't want to take time to try it. I advised them that if such was the case, that

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

we could secure a speedy trial by having a writ of habeas corpus issued, and I stated that if that was the case, that I would do that. Then, as I have stated before in this examination, I consulted with the Judge and also with the District Attorney, Mr. Babcock, who informed me that just as soon as the cases that were pending prior to the defendants' cases—these defendants' cases, McDonald and Barnowski—had been disposed of, that the defendants, McDonald and Barnowski, would be tried on the indictment upon which they were then being held. I so advised them by letter, and that is the reason that no writ of habeas corpus was ever issued.

Q. The various records show that you visited said defendants at the United States detention farm at Milan, Michigan, on October 5, 1938. At any time succeeding this date, and until January 23, 1939, did you see [37] either of said defendants or have any verbal or written intercourse, except the letter written to McDonald dated October 14, 1938, with said defendants of any nature or by any means whatsoever?

A. I believe that I saw the defendants once after that, at the detention farm, and it is my recollection that I also wrote a letter to them. Between what date is that?

Q. October 5, 1938 and January 23, 1939.

A. And I also saw the defendants at the Wayne County Jail.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. On what date did defendant McDonald file a complaint against you before the Michigan bar?

A. That was sometime in December, I believe.

Q. Is it true that a letter you wrote to McDonald, dated October 14, 1938, repudiating an agreement made with him on October 5, 1938, was the basis upon which his complaint before the Michigan State Bar was founded?

A. I did not repudiate any agreement with Mr. McDonald made at any time.

Q. On what date did the Michigan State Bar hear this complaint?

A. There never was any hearing on it, as far as I know.

Q. Is it true that you acted as defense counsel in the United States District Court for said complainants against you before the Michigan State Bar, while their said complaint was pending against you before the Michigan State Bar?

A. I believe that is true.

Q. On what date did you officially file with the United States Clerk, Mr. George M. Read, an appearance as defense counsel in case No. 24,742?

A. January 10th.

Q. Had you consulted either defendant about such proposed action? If so, when? By what means?

A. I had never discussed with them, any more than I ever discussed with any other client, the filing of an appearance, the formal filing of an

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

appearance; but it was my understanding I was to represent them, and it was upon that understanding that I filed the appearance.

Q. Did you notify said defendants of your filing said appearance? If so, when? [38]

A. I don't believe I did.

Q. Is it true that you never had any contact with said defendants personally or in writing, except by letter of October 14th to McDonald, from October 5, 1938 until the proceeding and trial, January 23, 1939?

A. That has been answered before.

Q. When you encountered McDonald in the Wayne County Jail on the evening of January 23, 1939, was attorney George Fitzgerald conferring with him?

A. Well, Mr. Fitzgerald was either there, or had been there, and it was based upon the fact that some friend of Mr. McDonald's had sent him in there.

Q. Is it true that McDonald stated to you at that time that you could not competently defend him because of your pending trial before the Michigan State Bar on his complaint.

A. I don't remember of any such conversation.

Q. Is it true that you advised McDonald that he would have to enter his objections to the Court?

A. There was some talk the date of the trial about my representing Mr. McDonald, and I told him at that time that I could not and would not

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

ask to be discharged from the case, but that if he wanted he could so advise the Court, which he did.

Q. Did the Court grant his request?

A. It did not.

Q. Is it true that McDonald rose a second time to protest and was ordered by the Judge to sit down? A. I don't recall that.

Q. Is it true that when the trial began of this said cause, on January 24, 1939, that you moved the Court for a postponement, so that you could prepare a proper structure of defense.

A. That is true.

Q. Was the motion granted? A. No.

Q. During your connection with this said cause, were you ever instructed by said defendants to consult any court official regarding their case? [39] If so, by what defendant? At what time? For what purpose? A. I don't recall.

Q. How many times did you consult Prosecutor Babcock to urge an early trial of said cause?

A. I believe I only saw him twice on this case.

Q. At any time during your connections with said case, did said defendants inform you that they had witnesses to be heard in their behalf?

A. They stated that there were witnesses that could be secured.

Q. Did you file a witness praecipe with the Court for witnesses to be subpoenaed in their behalf?

A. I secured subpoenas from the Court for wit-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

nesses, witnesses whom they claim could aid them in their defense.

Q. Were you present when the jury returned its verdict? A. I was.

Q. If so, did you poll the jury? A. No.

Q. If not, why not?

A. Because I didn't think it was necessary.

Q. Were you present when petitioners were sentenced? A. No.

Q. If so, did the Court permit either defendant to make a statement?

A. I am unable to say because I was not present.

Q. Was a statement made by either defendant?

A. I don't know.

Q. Which defendant? A. I don't know.

Q. Did you file a motion for a new trial?

A. I did.

Q. If so, on what date?

A. It was two days after the sentence, whatever date the sentence was.

Q. Was it denied? A. It was.

Q. On what date?

A. Well, the motion had been adjourned several weeks and finally was denied by the trial judge.

Q. Were you paid to file an appeal in this said cause? A. No.

Q. How much, and by whom?

A. I was paid no money by anyone to file an appeal in this cause.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Did defendant Barnowski's relatives pay you any money? A. They did.

Q. When, and for what purpose?

A. I believe it was around the 25th—they were not sentenced on the 25th?

Q. 26th of January.

A. About the 25th of January; I was paid a hundred dollars to file a motion for a new trial by Otto Barnowski's relatives.

Q. Was it denied? A. It was.

Q. Did you write a letter directed to defendant Barnowski at the United States Penitentiary at Leavenworth, Kansas, under date of May 3, 1939, with a request of two hundred dollars to further finance his appeal?

A. I believe I did.

Q. Is it true that the legal time limit for filing of appeal expired March 18, 1939?

A. I don't remember the dates that this took place.

Q. Is it true that you never filed a notice of appeal in case No. 24,742?

A. I believe that is right.

Mr. Davis: Redirect examination.

Redirect Examination

By Mr. Davis:

Q. The reason you didn't file an appeal, Mr. Curran, as I understand your testimony, is the fact that you were not paid to do so?

A. That is right.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Mr. Curran, prior to the morning the case convened in January—I believe it was January 24, 1939—I believe you have stated that you had no information or instructions from either defendant to withdraw as their attorney, other than the statement that was made in the courtroom, as you have testified? [41]

A. That is right.

Mr. Davis: Do you want the reporter to submit this and sign it?

Mr. Curran: I will waive my signature.

JOHN W. BABCOCK

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please.

A. John W. Babcock.

Q. Where do you reside? A. In Detroit.

Q. What is your occupation?

A. Chief Assistant United States Attorney for the Eastern District of Michigan.

Q. And have been——

A. Since May, 1937.

Q. Did you have charge of the case of United

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

States vs. Walter McDonald and Otto Barnowski,
No. 24742? A. I did.

Q. Will you state in detail the various steps in connection with the prosecution of the above named defendants?

A. On March 30, 1938, a complaint was filed, having been signed by an agent of the Federal Bureau of Investigation before Honorable Edward J. Moinet, United States District Judge, in the absence of the United States Commissioner, and a warrant signed for Walter McDonald by Judge Moinet. Judge Moinet at that time set April 18th as the date hearing before the United States Commissioner. On April 5, 1938, a similar complaint was filed with Judge Moinet, Special Agent Earl L. Richmond of the Federal Bureau of Investigation signing the complaint. Judge Moinet signed a warrant and Barnowski was arrested and [42] arraigned on the warrant. And Judge Moinet also set April 18th as the date for hearing before the Commissioner.

Q. Pardon me; just one question: At the arraignment of both of these petitioners were they represented by counsel?

A. They were represented by Mr. George F. Curran.

Q. Proceed.

A. Subsequently, upon being interviewed by agents of the Federal Bureau of Investigation, and of course as to this I have no personal recollec-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

tion, but I am just giving the facts as appear from the reports of the Federal Bureau of Investigation in our file, the two defendants told the agents of certain evidence that might—if true, establish their innocence, and in order to permit the complete investigation, with the possibility of establishing their innocence, as claimed by them, the hearings before the Commissioner were continued on April 18th to April 25th, and from April 25th to May 3, 1938.

Between April 25th and May 3, 1938, we determined that the evidence purportedly given to the Federal Bureau of Investigation agents by these two defendants, and investigated by the agents completely, was not reliable and determined to present the matter to the Grand Jury. It was presented on May 3, 1938, and an indictment voted. The indictment was returned and filed with the United States District Court of Michigan on May 4, 1938, and the two defendants arraigned on the indictment on June 10, 1938. At the time of this arraignment both defendants were represented by Mr. George F. Curran, attorney at law. The case was then held pending until January 24, 1939, when the trial commenced.

Q. In connection with the delay, or the interval of time elapsing from the return of the indictment until the trial, will you state what the condition of the docket, the criminal docket, was in this district?

A. The custom and practice among the judges

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

of the Eastern District of Michigan is to make available to the office of the United States Attorney only one judge during any given month, and this was the practice and custom in 1938 and 1939. Also it is the custom and practice in this district to excuse the traverse jury during the entire month [43] of August. Consequently we had no jury here during August of 1938. The docket, by reason of our inability to obtain the services of a judge and jury to try our cases, was very crowded, with cases which were instituted for the most part prior to the date of institution of this case No. 24,742.

Q. What was the nature of some of the cases that were taking the time of your office at this time, Mr. Babcock?

A. Well, without checking our statistical records I can't give you the facts for the complete period of time, but by way of example I have a distinct memory of a case of the United States against Norman Barry and others, a case involving mail fraud, conspiracy and violation of the Securities and Exchange Act, in which case, as I recall it now, the indictment was first returned in 1935 or early in 1936, and that was one of the cases which was disposed of or rather, of which disposition was made between the spring of 1938, and the end of that year. In fact, the trial of that case began early in October—I think October 3, 1938, and the trial of that case continued until December 19, 1938.

Q. Mr. Babcock, was the case of Barnowski and

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

McDonald handled as quickly as it could be handled in this district, considering the volume of business and the interests of the public at large?

A. Very definitely it was. The investigation was completed about the time of the return of the indictment and the case was ready for trial and was tried at the earliest possible moment consistent with the developments of the calendar, in the usual course of events.

Q. Mr. Babcock, when this case came on for trial,—I believe on January 24, 1939—will you state whether or not the petitioners, McDonald and Barnowski, appeared in court that morning with an attorney?

A. They did; they were represented by Mr. George F. Curran.

Q. Do you recall any conversation that occurred at the commencement of the trial relative to any statement made by the petitioner McDonald in court that morning?

A. I remember that when Court opened Judge Moinet asked if we were ready to proceed with the trial, and I advised him the Government was ready [44] to proceed. I don't recall what response Mr. Curran made, but I recall that Mr. McDonald rose from his chair and said to the Court that he had been having some differences with his attorney and desired opportunity to obtain another attorney. But that was all that was said.

Q. Was a formal motion filed by either McDon-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

ald or Barnowski for the appointment of other counsel? A. No, sir.

Q. Was a formal motion made by either McDonald or Barnowski or Curran, their attorney, for a continuance of the case?

A. No formal motion in writing. Now that you mention the matter of continuance, I do recall that Mr. Curran stated that either that very morning or the evening before the defendants had named to him several people whom they desired to have subpoenaed as witnesses, and he did request a continuance for the purpose of subpoenaing these parties as witnesses.

Q. Were those witnesses later produced in Court?

A. I do not know. The names of the parties were not given to the Court or to anyone else.

Q. Now, was the trial proceeded with then?

A. Yes, sir. Incidentally, I am very certain that no exception was taken to the Court's denial of the informal motion for continuance.

Q. Did the Government put on its evidence then? A. Yes, sir.

Q. And then did the defendants put on their evidence? A. Yes.

Q. Have witnesses appear in their behalf?

A. Oh, yes.

Q. The case was argued by both sides?

A. Yes, sir.

Q. The jury instructed? A. Yes, sir.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. Retired, and returned a verdict of guilty?

A. Yes, sir. [45]

Q. Mr. Babcock, did you at any time have any conferences with Mr. George Curran, attorney for Barnowski and McDonald, prior to the date of the trial, in regard to their securing an early trial in the case?

A. I remember very distinctly that I had one, and it may be possible that he might have telephoned me a few times on other occasions, but on only one occasion did he come over to the office to see me.

Q. And in that conversation did you explain the condition of the docket, as you have already testified here, to Mr. Curran?

A. I did. Mr. Curran advised me that he had been requested by Barnowski and McDonald to petition for a writ of habeas corpus to protest their detention at Milan because of the delay of the trial. I told him we, of course, would do nothing to prevent his suing out the writ of habeas corpus, but that the condition of the docket, the criminal docket, was such that the case just could not be brought on for trial, at least not at that particular moment, because at the time of our conversation the prosecution of the Norman Barry case was in progress.

Q. Now, Mr. Babcock, in connection with the morning the trial convened, did Mr. McDonald or did anybody in the courtroom state what the details

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

of the alleged differences were between McDonald and Mr. Curran to the Court?

A. No, sir.

Q. Was anything said by Mr. McDonald or Mr. Curran, or Mr. Barnowski, to the effect that they had filed charges before the Michigan Bar against Mr. Curran? A. I don't recall that.

Mr. Davis: Mr. Babcock, the petitioners have filed written interrogatories to be asked of you at this time. I will ask them now.

Cross Examination

Q. Is it true that Earl Richmond had charge of the investigation in case 24,742?

A. I don't know. Mr. Richmond, one agent D. L. McCormack, and Special Agent L. K. Cook of the Federal Bureau of Investigation all participated in the investigation. [46]

Q. When was said investigation concluded?

A. I think I should answer that by saying when the trial was over, in view of the fact that all our investigations continue constantly until the conclusion of the trial.

Q. When was Richmond transferred out of the Eastern District of Michigan?

A. I do not know.

Q. Is it true that the reason said cause was not tried according to its docket number was because all witnesses refused to identify said defendants at that time? A. That is not so.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. Why did you refuse to permit Richmond to give said defendants the lie detector test?

A. I did not refuse.

Q. Why were 125 cases advanced to be heard at the expense of the priority enjoyed by case No. 24,742?

A. I do not know that 125 cases were advanced, or that any cases were advanced.

Q. Why did you have said case continued before the United States Commissioner until an indictment was returned?

A. Because the defendants, as I was advised, had requested the Federal Bureau of Investigation agents to make certain investigations which the defendants thought would establish their innocence, and both the Federal Bureau of Investigation and our office were as anxious to establish their innocence, if that was a fact, as we were to establish their guilt, if that was a fact.

Q. Did you ever talk with attorney Morris Weller about this said cause?

A. I do not recall ever having a conversation with Morris Weller or knowing the gentleman at all.

Q. If so, state in detail the substance of said conversation. That is answered, I take it, by your former answer. Did you ever have any conversation with attorney George Fitzgerald about said defendants?

A. I do not recall having a conversation with Mr. Fitzgerald about this case.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. State the substance of said conversation. I take it that is answered [47] by the former question? A. That's right.

Q. Did Attorney Curran, in November, 1938, complain to you about attorney George Fitzgerald taking active interest in securing a writ of habeas corpus for said defendants?

A. I do not recall that he did.

Q. State the facts concerning this conflict of interest and what part you had in it.

A. I do not recall any conflict of interest and know that I had no part in any such conflict, if any such conflict existed.

Q. Did you talk the matter over with attorney George Fitzgerald in your office?

A. I do not recall ever doing so?

Q. Did you settle this misunderstanding?

A. I certainly did not settle any misunderstanding.

Q. Did you advise Attorney Fitzgerald not to interfere in this said cause, as defendants did not have any money anyway? A. I did not.

Q. Did you receive a letter from defendant Barnowski, while he was confined in the United States detention farm at Milan, Michigan?

A. The file of our office indicates that a letter was written to me by a Barnowski on November 17, 1938.

Q. If so, why was this request ignored?

A. As I recall it, it was about this same time

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

that Mr. Curran called on me to take up the question of bringing the case on for trial, and the letter was not ignored because I felt it was answered by my conversation with his attorney.

Q. Why did you personally prevent him from obtaining his own physician to testify as to his physical deformity? A. I did not.

Q. Isn't it a fact that you personally made a secret agreement with Attorney George Curran whereby he was to be present at said defendants' trial to conform to legal requirements, but to make a feeble attempt only to defend said defendants, so as to insure a conviction, regardless of what methods he "choose" to employ? A. It is not.

Redirect Examination

By Mr. Davis:

Q. Mr. Babcock, do you have an opinion as to whether Barnowski and McDonald had a fair trial in their case in your district?

A. I am convinced they did.

Mr. Davis: I think that is about everything. Do you want to waive your signature?

Mr. Babcock: I will waive it.

Exhibit "C"—(Continued)

State of Michigan

County of Wayne—ss.

CERTIFICATE OF NOTARY PUBLIC

I, Eugene Karst, a Notary Public in and for said County and State aforesaid, duly commissioned and qualified, do hereby certify that the witnesses George F. Curran and John W. Babcock, whose depositions were taken before me on behalf of Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Wayne County, Michigan, were by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said depositions then given by said witnesses was by me reduced to writing, and the said depositions are true and correct transcripts of the whole of the testimony so given by the said witnesses as aforesaid.

I further certify that the signature to said testimony were waived by counsel for the Respondent and by said witnesses.

The document referred to in the testimony of George F. Curran was delivered to me and marked Government's Exhibit 1, and is attached hereto.

I do further certify that the said depositions hereto attached were taken at the time and place mentioned and described in the caption and notice con-

Exhibit "C"—(Continued)

tained in said depositions and in the notice of said depositions which is hereto attached; and that said depositions were taken for the [49] reason that the said witnesses live at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the depositions aforesaid to the said Court with my own hand, I have sealed up the same and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said depositions have been retained in my possession since the taking thereof, and until the same were sealed up by me and delivered to said Court by United States mail as aforesaid.

I do further certify that the respondent, Robert H. Hindspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time of the taking of the said depositions by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division; and that petitioners Walter McDonald and Otto Barnowski were not represented by counsel nor present at the time of the taking of said depositions.

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

In Witness Whereof, I have hereunto set my

Exhibit "C"—(Continued)

hand and seal at Detroit, County of Wayne and State of Michigan, this 7th day of July, A.D. 1941.

EUGENE KARST

Notary Public, Wayne County, Michigan. My commission expires Jan. 17, 1944.

[Endorsed]: Filed June 13, 1945. C. W. Calbreath, Clerk. [50]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered That James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 23rd day of July, 1945, at the hour of 10 o'clock A.M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: June 15th, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Jun. 15, 1945. [51]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, James A. Johnston, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of the United States of America vs. Walter McDonald, et al, Criminal No. 24742, made and entered on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its opinion of January 10, 1944, reported in 139 F.(2d) 939, and transfer order dated May 15, 1943, issued at Washington, D. C., by direction of the Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States;

II.

That heretofore petitioner filed a petition for writ

of habeas corpus before this Honorable Court in case number 23414-S, which petition was denied;

III.

That the entire record of the proceedings in habeas corpus case number 23414-S is referred to and incorporated herein as though set forth in full. [52]

Wherefore respondent prays that the petition for writ of habeas corpus be denied.

Dated: July 23, 1945.

(Signed) FRANK J. HENNESSY
United States Attorney.

[Endorsed]: Filed July 23, 1945. [53]

[Title of Court and Cause.]

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

The above named petitioner, Walter McDonald, in answer to the return of James A. Johnston, Warden, to the order to show cause, respectfully shows:

I.

That respondent, by failing to deny any of the averments in the petition for writ of habeas corpus, tacitly concedes the verity of said allegations in said petition.

II.

That the question of fact being involved, and not disputed by respondent, it remains only for the

court to hear the cause upon the merits, reach its determination upon the oral testimony and the depositions, and enter judgment. (Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574.)

III.

Respondent prays for a denial of the petition for the writ of habeas corpus for the reason that petitioner had a prior petitioner denied. This prior petition has no relevancy whatsoever to the present application and, therefore, merits no discussion.

Wherefore, petitioner having been denied his personal request for the assistance of counsel during his trial on indictment No. 24742, the trial court lost jurisdiction to proceed to trial and conviction of petitioner. And by reason thereof petitioner is now illegally deprived of his liberty. Petitioner prays this court for a hearing on the merits, that pertinent testimony be adduced, that the issue of fact involved be judicially determined, and that judgment be entered accordingly.

Respectfully submitted,

WALTER McDONALD

Petitioner Pro se

Dated August 1, 1945.

[Endorsed]: Filed Aug. 1, 1945. [54]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of August, in the year of our Lord one thousand nine and forty-five.

Present: the Honorable A. F. St. Sure
District Judge.

[Title of Cause.]

ORDER APPOINTING WAYNE COLLINS,
ESQ., AS COUNSEL FOR PETITIONER

This case came on regularly this day for hearing on the order to show cause. The petitioner herein having requested the Court to appoint counsel to represent him in this matter, the Court this day appointed Wayne Collins, Esq., as counsel for the petitioner, and Ordered that this matter be continued to August 23, 1945. [55]

[Title of Court and Cause.]

MEMORANDUM AND ORDER DENYING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND REMANDING THE CASE AGAINST PETITIONER TO THE DISTRICT COURT OF MICHIGAN FOR FURTHER PROCEEDINGS.

Petitioner seeks release from the United States Penitentiary at Alcatraz upon the ground that he was denied his constitutional right of assistance of counsel at the time of his trial upon the charge for which he is imprisoned.

Petitioner with another defendant was indicted in the District Court of the United States for the Eastern District of Michigan, Southern Division, charged with violation of Title 12 USCA ss588b(a) and 588b(b). Each was found guilty and was sentenced on January 26, 1939 to a term of imprisonment of 35 years.

Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed.

Petitioner contends that his case is governed by *Glasser v. United States*, 315 U.S. 60. [56]

Respondent in moving to dismiss contends that petitioner knew of this point, which he now raises for the first time, when he filed his petition, No. 23414-S which was denied by this Court on August 29, 1944 (affirmed 149 F. (2d) 768), and that he is therefore barred from asserting the point under *Swihart v. Johnston*, decided by the Ninth Circuit Court of Appeals on August 6, 1945. Respondent also urges that the very point petitioner now raises, namely that he was denied assistance of counsel, was decided adversely to him in 113 F. (2d) 984 and 129 F. (2d) 196, and that this Court should follow the ruling of the Tenth Circuit Court.

In the *Glasser* case, *supra*, *Glasser*, a former Assistant United States Attorney was found guilty of conspiracy to defraud the United States and appealed. At the time of trial *Glasser's* counsel was appointed by the court to represent one of the co-defendants. *Glasser* objected to the appointment of his attorney to represent a co-defendant, but the appointment was made and the trial had. The Supreme Court said, page 70: “* * we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one’s own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U.S. 45, so are we clear that the ‘assistance of counsel’ guaranteed by the Sixth Amend-

ment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired. * * * We are told that, since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional [57] experience may be a factor in determining whether he actually waived his right to the assistance of counsel. *Johnston v. Zerbst*, 304 U.S. 458, 464. But it is by no means conclusive. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. * * * The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." The conviction of Glasser was set aside and he was remanded to the court for a new trial.

The language of the *Swihart* case, *supra*, relied

on by respondent, is to the effect that if facts are known to the petitioner and they are not alleged in his first petition he should not be allowed to file another petition based upon the same matters, for "to reserve them for use in a later proceeding 'was to make an abusive use of the writ of habeas corpus' ". The court further said: "Each petition is to be disposed of in the exercise of a sound judicial discretion guided and controlled by whatever has a rational bearing on the propriety of the discharge sought. One of the matters which may be considered and given controlling weight is prior refusal to discharge on a like petition." The rule stated may be invoked where there is a repetitious filing, but if the point raised by the petitioner is one which affects his substantial legal rights, although known and not urged in a prior petition, the trial court should take judicial cognizance of it.

As we have seen, the point of assistance of counsel has not been heretofore raised in this court by petitioner. And respondent points out that in *McDonald v. Hudspeth*, 113 F.(2d) 984 and in *McDonald v. Hudspeth*, 129 F. (2d) 196 the Circuit Court of Appeals for the Tenth Circuit decided that petitioner did have assistance [58] of counsel. The first case was decided before the Supreme Court's decision in the *Glasser* case. The second case was decided after, but there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the *Glasser* case or its decision would have been otherwise.

Here we have a layman charged with a serious crime who informs the court that he has had differences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald) Glasser is disclosed by the record before us."

Applying the ruling in the Glasser case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the "requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus." *Johnston v. Zerbst*, 304 U.S. 458, 468.

In conformity with the rule mentioned in *In re Bonner*, Pet., 151 U.S. 242, 261, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, for further action by that Court.

It is therefore Ordered:

1. That Walter McDonald, petitioner herein, be and he is hereby remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the said indictment. [59]

2. The motion to dismiss is Denied.

Dated: September 20, 1945.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Sept. 20, 1945. [60]

[Title of Court and Cause.]

NOTICE TO APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice is hereby given that James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, the respondent in the above entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Memorandum and Order Denying Motion to Dismiss Petition for Writ of Habeas Corpus and Remanding the case against Petitioner to the District Court for the Eastern District of Michigan for further Proceedings, made and entered in the above entitled action on September 20, 1945.

Dated: September 21, 1945.

(Signed) FRANK J. HENNESSY

United States Attorney,

(Signed) JOSEPH KARESH

Assistant United States

Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Sept. 21, 1945. [61]

[Title of Court and Cause.]

NOTICE

To: Wayne M. Collins, Esq., Attorney at Law,
Mills Tower, San Francisco, California.

You Are Hereby Notified that on Sept. 21, 1945
a Notice of Appeal was filed by Frank J. Hennessy,
Esq., United States Attorney in the above entitled
case. A copy of which is enclosed herewith.

C. W. CALBREATH

Clerk, U. S. District Court

San Francisco, California, September 26, 1945.

[Title of Court and Cause.]

NOTICE OF MOTION

To Respondent Above-Named and to Frank J. Hennessy, U. S. Attorney, and Joseph A. Karesh, Deputy U. S. Attorney, Attorneys for the Respondent:

Please take notice that the petitioner, by his undersigned attorney, will bring the within motion on for hearing before this Court in the Department of Hon. A. F. St. Sure, U. S. District Judge, Post Office Building, 7th and Mission Streets, San Francisco, California, on Monday, October 8, 1945, at 10 o'clock A.M. of said day or as soon thereafter as counsel can be heard.

Dated: September 29, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner.

[Title of Court and Cause.]

MOTION TO AMEND FINDINGS AND JUDGMENT

William McDonald, the petitioner in the above-entitled proceeding, moves the Court to amend its findings and the order and judgment made and entered herein on September 20, 1945, captioned "Memorandum and Order Denying Motion to Dismiss Petition for Writ of Habeas Corpus and Remanding the Case Against Petitioner to the District

Court of Michigan for Further Proceedings" in the following particulars, to-wit:

By revoking, vacating, setting aside and striking therefrom the order remanding the petitioner to the custody of the U. S. Marshal for the Northern District of California and the order returning him to the U. S. District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the indictment therein referred to, which said matter appears on page 4 thereof and numbered and reading as follows, viz.,

"1. That Walter McDonald, petitioner herein be and he is hereby remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the said indictment."

and

To find, order, and adjudge as follows, to-wit that the petitioner is unlawfully held in custody and restrained of his liberty by respondent; that he is entitled to discharge from said custody and release from said restraint; that his application and petition to be restored to his liberty be granted and that forthwith he be ordered released from the custody and unlawful restraint of the respondent, his jailor, and also from the custody and jurisdiction of this court and the United States Marshal for the Northern District of California in whom such custody and jurisdiction technically may be lodged.

This motion will be based upon all the pleadings, records and files herein, including the petition for writ of habeas corpus, the order to show cause issued thereon, the return thereto entitled motion to dismiss, the traverse to the motion to dismiss, and the minute order of the Court entered on September 20, 1945, and the written order, judgment and opinion, above-mentioned, entered herein on said date by said Court, this motion and notice thereof and points and authorities in support thereof.

Dated: September 29, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner.

(Here follows Points and Authorities in Support of Motion.)

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Sept. 29, 1945. [65]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75 (a)

James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, the respondent herein, hereby designates the complete record and proceedings in the above entitled cause for inclusion in the record on appeal, the same to include therein the following:

In Case No. 24885-S:

(1) Petition for writ of habeas corpus.

- (2) Order to show cause.
- (3) Return to order to show cause.
- (4) Traverse to return to order to show cause.
- (5) Order appointing Wayne Collins, Esq., as attorney for petitioner. [66]
- (6) Opinion and order of United States District Judge A. F. St. Sure of September 20, 1945.
- (7) Notice of appeal.
- (8) Clerk's notice of appeal.
- (9) This designation of contents of record.
- (10) Clerk's certificate.

In Case No. 23414-S:

- (1) Petition for writ of habeas corpus.
- (2) Order to show cause.
- (3) Return to order to show cause and all respondent's exhibits.
- (4) Traverse to return to order to show cause.
- (5) Order of United States District Judge A. F. St. Sure of August 16, 1944, denying petition for writ of habeas corpus.
- (6) Amended order of United States District Judge A. F. St. Sure of September 5, 1944, denying petition for writ of habeas corpus.
- (7) Notice of appeal.
- (8) Mandate of Circuit Court of Appeals for

the Ninth Circuit affirming judgment of the District Court.

(Signed) FRANK J. HENNESSY

United States Attorney,

(Signed) JOSEPH KARESH

Assistant United States At.
torney,

Attorneys for Respondent James A. Johnston,
Warden, United States Penitentiary, Alcatraz,
California.

[Endorsed]: Filed Oct. 5, 1945. [67]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 23rd day of October, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

DENYING MOTION TO AMEND FINDINGS
AND JUDGMENT

Petitioner's motion to amend findings being submitted to the Court for consideration and decision, and the same now being fully considered, it is Ordered that since this case has been appealed,

this Court has no jurisdiction in the matter, and the motion is therefore denied. [68]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Appellant herein may have to and including December 10, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: October 31, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Oct. 31, 1945. [69]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Appellant herein may have to and including December 20, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: December 10, 1945.

A. F. ST. SURE

United States District Judge.

Endorsed]: Filed Dec. 10, 1945. [69-A]

[Title of Court and Cause.]

NOTICE OF APPEAL—(Cross-Appeal)

Notice is hereby given that Walter McDonald, petitioner above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the following part of that certain final judgment accompanied by written opinion entitled "Memorandum And Order Denying Motion To Dismiss Petition For Writ Of Habeas Corpus And Remanding The Case Against Petitioner To The District Court of Michigan For Further Proceedings" made and entered in this proceeding by the above-entitled Court on September 20, 1945, to-wit, that part thereof providing that petitioner be "remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on said indictment" and from that certain final order of the above-entitled Court, minute entry, denying [70] petitioner's "Motion To Amend Findings And Judgment" which was made and entered herein on October 23, 1945.

Dated: October 24, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner.

[Endorsed]: Filed Nov. 9, 1945. [71]

[Title of Court and Cause.]

PETITIONER'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL AND
PRAECIPE

Walter McDonald, petitioner herein, hereby designates that the complete record and all the proceedings in the cause be included in his record on appeal (cross-appeal) herein and that the same be included or incorporated in respondent's record on appeal herein and that it contain, in addition to the matter designated by respondent in his designation, the following, viz:

(1) Petitioner's Notice of and Motion To Amend Findings And Judgment filed herein on September 29, 1945.

(2) Order of Court (minute entry) made and entered on October 23, 1945, denying petitioner's Motion To Amend Findings And Judgment on ground that district court had no jurisdiction to amend [72] for the reason the respondent had filed his notice of appeal from the judgment which stayed proceedings in the district court;

(3) Petitioner's Notice of Appeal (Cross-Appeal) dated October 24, 1945; and

(4) This Designation of Contents of Record On Appeal and Praecipec, together with the below Stipulation.

Dated: October 24, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner,
Cross Appellant.

STIPULATION

It is stipulated that the matters above-mentioned may be included in and consolidated with respondent's record on appeal and that such record be treated as a consolidated and as a several record on appeal of appellant and cross-appellant under Rules 74 and 75 (k) R.C.P.

Dated: October 24, 1945.

FRANK J. HENNESSY

U. S. Attorney

JOSEPH KARESH

Asst. U. S. Attorney

Counsel for Respondent and
Appellant.

WAYNE M. COLLINS

Counsel for Petitioner and
Cross-Appellant.

[Endorsed]: Filed Nov. 9, 1945. [73]

In the United States District Court for the Northern District of California, Southern Division

C. A. No. 23414-S

In the Matter of:

WALTER McDONALD,

Petitioner

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Walter McDonald respectfully shows:

That he is illegally restrained of his lawful liberty by color of authority of the United States and in the immediate custody of James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, which penitentiary is within the legal jurisdiction of this court.

STATEMENT OF FACT

Petitioner, on May 4, 1938 in the United States District Court for the Eastern District of Michigan, was indicted on six counts for violation of title 12, Section 588B, subsection (a), first count and title 12, Section 588B, subsection (b), second, third, fourth, fifth and sixth counts, the bank robbery statute. His trial began on January 24, 1939. A

verdict of guilty was returned on January 25, and January 26, 1939, he was sentenced to 35 years imprisonment. In support of which is an authentic copy of his judgment number 24742 attached hereto, made a part hereof and marked petitioner's Exhibit A.

On October 21, 1943, without trial or other due process, petitioners first said sentence was vacated and set aside and a second sentence of 25 years additional was imposed. In support of which is an authentic copy of said second judgment number 24742 attached hereto, made a part hereof and [75] marked petitioner's exhibit B.

STATEMENT OF THE CASE

On January 26, 1939, a cumulative sentence of 35 years was imposed on six counts of an indictment each count receiving an implied sentence of five years and ten months; all sentences to be served consecutively. This was a valid sentence. However, it was duplicitous as it imposed six sentences on six counts (only one of which was valid) for one offense.

In May 1943, petitioner had completed one sixth of the cumulative sentence imposed, in conformity with section 710, Title 18 U.S.C.A., the good time statute, which was the legal sentence on the one valid count.

On June 14, 1943, the United States Attorney for the United States District Court, Eastern Dis-

trict of Michigan, petitioned said District Court to vacate and set aside said first sentence as five of said six counts of said indictment numbered 24742 was repugnant to the Fifth Amendment.

On October 21, 1943, said petititon was granted and petitioner was given a second sentence of 25 years additional on the one good count.

CONTENTION OF PETITIONER

That petitioner is now restrained of his lawful liberty by color of authority of a court judgment without valid force or effect in law in that it puts petitioner a second time in jeopardy for the same offense in express violation of the Fifth Amendment of the United States Constitution.

WAIVER

It appearing from the substance and form of this petition for writ of habeas corpus that final adjudication of this legal action may be made and judgment entered solely on the recorded facts on the face of this record petitioner does, [76] here and now and by this method, waive his legal right, if any he may have, to be present in court at the hearing and disposition of this habeas corpus action.

PRAAYER

Wherefore, petitioner prays this Honorable court for a writ of habeas corpus ad subjiciendum to the respondent herein, Warden James A. Johnston,

commanding him to release petitioner forthwith from further unlawful custody. And petitioner will ever pray.

/s/ WALTER McDONALD

Petitioner Pro. Se.

AFFIDAVIT OF VERIFICATION

Personally appeared before me Walter McDonald, who, after being first duly sworn, upon his oath deposes and says; that he is the petitioner in the above entitled cause; that he has read the contents thereof; and that they are true to the best of his knowledge and belief.

/s/ WALTER McDONALD

Affiant and Petitioner.

Subscribed and Sworn to before me a Notary Public this 26 day of May, 1944.

[Seal] /s/ E. J. MILLER

Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden—Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Walter McDonald is a citizen of the United States. [77]

EXHIBIT "A"

At a session of the United States District Court for the Eastern District of Mich., continued and held pursuant to adjournment at the Dist., Court room in the city of Detroit in said District on Thursday the twenty-sixth day of Jan., A. D. 1939.

Present: The Honorable E. J. Moinet, United States Judge.

UNITED STATES OF AMERICA

vs.

WALTER McDONALD and
OTTO BARNOWSKI

Indictment for vio: Title 12, Sec. 588 B (a) (b),
U.S.C. Banking Act of 1935, as amended. No.
24742. Filed 10 A. M., Jan. 26, 1939.

The defendant, Walter McDonald, alias, being present in court, and being represented by counsel, and having been found guilty by jury, of the charges in said indictment contained, and now being before the Bar of the court for sentence, and inquired of by the court if he had anything to say why sentence should not be imposed, and the court having fully considered all that said defendant had to say in his behalf, thereupon the court does now sentence said defendant Walter McDonald to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term and period of thirty-five years,

beginning on the date he is received at the penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention.

/s/ EDWARD J. MOINET
U. S. District Judge.

Approved as to form:

By: /s/ JOHN W. BABCOCK
Asst. U. S. Attorney. [78]

EXHIBIT "B"

In the District Court of the United States for the
Eastern District of Michigan, Southern Division

UNITED STATES OF AMERICA

vs.

WALTER McDONALD

Filed Oct 21, 1943.

No. 24742, Criminal Indictment in six counts for violation of U.S.C. Title 12, Section 588B (a), (b), Banking Act of 1935, as amended.

At a session of said court held in the Federal Building in the City of Detroit, this 21 day of October, A. D. 1943.

Present: Honorable Edward J. Moinet, U. S. District Judge.

In the matter above entitled, the defendant, after due and proper trial, was found guilty of the charges in the indictment by verdict of jury returned January 25, 1939, and the judgment of this court was entered January 26, 1939, committing said defendant to custody of the Attorney General for imprisonment for the term of thirty five years. It now appearing to the court that said judgment and sentence was void and, by order entered upon motion of the United States Attorney, has been vacated and set aside, the said defendant, Walter McDonald is now present in court for the purpose of re-sentence.

The said defendant, Walter McDonald, now being before the Bar of the Court for sentence, and having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative, consequent upon the verdict of guilty of the charges alleged in count two of the indictment filed herein, for the period [79] twenty five (25) years from and including this day, for imprisonment in a penitentiary.

It is Further Ordered that the Clerk deliver a

certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ EDWARD J. MOINET
U. S. Dist. Judge.

Approved as to form:

/s/ JOHN W. BABCOCK,
Asst. U. S. Atty.

[Endorsed]: Filed June 22, 1944. C. W. Calbreath, Clerk. [80]

[Title of Court and Cause—No. 23414-S.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein:

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 26th day of June, 1944, at the hour of 10 o'clock A. M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: June 14, 1944.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed June 14, 1944. [81]

[Title of Court and Cause—No. 23414-S.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary, through Frank J. Hennesy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issued herein shows as follows:

I.

That the person hereinafter called the "petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, James A. Johnston, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, et al., Criminal No. 24742, made and entered on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its opinion of January 10, 1944, and transfer order dated May 15, 1943, issued at Washington, D. C., by direction of the

Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States;

II.

That filed herewith and as a part of the Return and incorporated herein as though set forth in full are the following, constituting Respondent's Exhibit "A":

1. A certified copy of the original indictment, plea, verdict, sentences, and

2. Docket entries in said Criminal Cause No. 24742;

3. Transfer order issued as aforesaid on May 15, 1943;

4. A copy of the Record of Court Commitment of the [82] Department of Justice, Penal and Correctional Institutions United States Penitentiary at Alcatraz, California, in the case of Walter McDonald, No. 602 AZ;

III.

That also referred to and incorporated herein as though set forth in full is the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case of McDonald vs. Moinet, CCA-6 No. 9538, reported in 139 F. (2d) 939.

Wherefore respondent prays that the petition for habeas corpus be denied and the order to show cause discharged.

Dated: July 4, 1944.

FRANK J. HENNESSY

United States Attorney for the Northern District
of California

[Endorsed]: Filed July 5, 1944. [83]

RESPONDENT'S EXHIBIT "A"

Vio: Title 12, Sec. 588 (B) a, (b), USC, Banking
Act of 1935, as amended.

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division

Of the March Term, A. D., 1938

CR-24742

Eastern District of Michigan,
Southern Division—ss.

The Grand Jurors of the United States of
America empaneled and sworn to inquire in and for
the body of the Southern Division of the Eastern
District of Michigan, upon their oaths present:
That heretofore, on or about the 25th day of March,
A. D. 1938, in the Southern Division of the Eastern
District of Michigan, and within the jurisdiction of
this Honorable Court, Walter McDonald, alias Wal-
ter Lewis, alias Walter McDougal, alias William
McDonnell, alias Walter Parkins, alias Walter Per-
kins, and Otto Barnowski, alias Otto Burns, alias

Respondent's Exhibit "A"—(Continued)

Otto Baranowski, late of the City of Detroit, Michigan, hereinafter referred to as defendants, did, by force and violence, and by putting in fear, unlawfully, wilfully, knowingly and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper, officers and employees of the Farmington State Bank, a banking corporation organized and doing business under the laws of the State of Michigan, and a member bank of the Federal Reserve System, and an insured bank in the Federal Deposit Insurance Corporation, [84] certain monies, to-wit: the sum of five thousand eighty and 50/100 (\$5,080.50) Dollars, lawful money of the United States of America, the exact denominations of the certificates, currency and coin comprising the sum aforesaid being to these Grand Jurors unknown, which said sum of money, at the time it was so robbed, stolen and taken by the defendants as aforesaid, belonged to and was in the care, custody, control, management and possession of a certain bank, to-wit: the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation, and a member bank in the Federal Reserve System; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter

Respondent's Exhibit "A"—(Continued)

McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly, and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: [85] assault, and put in jeopardy the life of Howard C. Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranow-

Respondent's Exhibit "A"—(Continued)

ski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of G. Irene Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FOURTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, [86] alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the

Respondent's Exhibit "A"—(Continued)

Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of Arvale Tipper, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FIFTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense

Respondent's Exhibit "A"—(Continued)
hereinbefore described in the first count [87] hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Kniekerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the life of Mary Elizabeth Berry, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

SIXTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously, rob,

Respondent's Exhibit "A"—(Continued)

steal and take from the possession of Howard G. Knickerbocker, G. Irene Knickerbocker and Alvale Tipper money in the care, custody, and control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the life of Robert J. Stewart, by [88] the use of dangerous weapons, to-wit: pistols and revolvers; Contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN C. LEHR

United States Attorney,

JOHN W. BABCOCK

Assistant United States Attorney, Eastern District
of Michigan. [89]

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room, in the City of Detroit, in said District on Friday, the tenth day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

Respondent's Exhibit "A"—(Continued)

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, being present in Court and being arraigned on the indictment heretofore filed against him, waives the reading thereof and pleads not guilty to the charges in said indictment contained.

Thereupon the Court does now fix the bail of said defendant at the sum of \$50,000.00.

EDWARD J. MOINET,
U. S. District Judge. [90]

United States of America, in the District Court of
the United States, for the Eastern District of
Michigan, Southern Division.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Wednesday, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

In this cause, the jurors heretofore empaneled

Respondent's Exhibit "A"—(Continued)

and sworn, come into Court again and sit together, and after hearing the conclusion of the evidence in the case, the arguments of counsel, and the charge of the Court, retire under the charge of the officer duly sworn for that purpose to consider of their verdict to be rendered; and after being absent for a time come into Court again and say upon their oaths that defendants, Walter McDonald, alias, and Otto Barnowski, alias, are guilty as charged.

Thereupon said jurors are excused from further consideration of this case, and the Court do now here order the sentence of said defendants deferred to tomorrow, January 26, 1939, and said defendants remanded into the custody of the United States Marshal.

EDWARD J. MOINET,
U. S. District Judge. [91]

At a Session of the United States District Court for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit in said District on Thursday, the twenty-sixth day of January, A.D. 1939.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias, being present in Court, and being represented by coun-

Respondent's Exhibit "A"—(Continued)

sel, and having been found guilty by Jury, of the charges in said indictment contained, and now being before the Bar of the Court for sentence, and inquired of by the Court if he had anything to say why sentence should not be imposed, and the Court having fully considered all that said defendant had to say in his behalf, thereupon the Court does now sentence the said defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term and period of thirty-five (35) years, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a Jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such Jail or other place of [92] detention.

(Signed) EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.

By JOHN W. BABCOCK,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 26, 1939. [93]

Respondent's Exhibit "A"—(Continued)

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division.

[Title of Cause.]

At a session of said Court held in the Federal
Building in the City of Detroit, this 21st day of
October, A.D. 1943.

Present: Honorable Edward J. Moinet,
United States District Judge.

In the matter above entitled, the defendant, after
due and proper trial was found guilty of the charges
in the indictment by verdict of jury returned Jan-
uary 25, 1939, and the judgment of this Court was
entered January 26, 1939, committing said defend-
ant to the custody of the Attorney General for im-
prisonment for the term of thirty-five years. It now
appearing to the Court that said judgment and sen-
tence was void and by Order entered upon motion
of the United States Attorney has been vacated
and set aside, the said defendant, Walter McDon-
ald, is now present in Court for the purpose of re-
sentence.

The said defendant, Walter McDonald, now be-
ing before the Bar of the Court for sentence, and
having been now asked whether he has anything to
say why judgment should not be pronounced against
him, and no sufficient cause to the contrary being
shown or appearing to the Court, It Is By the Court

Respondent's Exhibit "A"—(Continued)

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative, consequent upon the verdict of guilty of the charges alleged in Count Two of the indictment filed herein, for the [94] period of twenty-five (25) years from and including this day, for imprisonment in a penitentiary.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) EDWARD J. MOINET,

United States District Judge.

Approved as to form:

(Signed) JOHN W. BABCOCK,

Assistant U. S. Attorney. [95]

CRIMINAL DOCKET

Docket 24742

[Title of Cause.]

1938. Proceedings.

May 4 Indictment filed. Report of vote of Grand Jurors filed.

Respondent's Exhibit "A"—(Continued)

1938

June 10 Defendant Walter McDonald arraigned, Indictment read, pleads Not Guilty. Bond fixed \$50,000.00. Remanded to custody Moinet J. Defendant Otto Barnowski arraigned. Indictment read. Pleads Not Guilty. Bond fixed at \$50,000.00. Remanded to custody Moinet J.

1939.

Jan. 11 Appearance of Defendant Walter McDonald by George F. Curran, Attorney, filed. Appearance of defendant Otto Barnowski by George F. Curran, Attorney, filed.

Jan. 20 Subpoena to Mary Elizabeth Beery rtd seved January 18, 1939 filed.

Jan. 24 Jury trial begins. Jurors impaneled and sworn. Witnesses sworn. Continued to Jan. 25, 1939. Moinet J.

Jan. 25 Jury trial resumed. Arguments of Counsel. Charge of the Court.
Verdict: Guilty as charged—both defendants. Sentence deferred to January 26, 1939. Defendants remanded. Moinet J.

Jan. 26 Defendant Walter McDonald sentenced to imprisonment for 35 years. Moinet J. Commitment issued.
Defendant Otto Barnowski sentenced to imprisonment for 35 years. Moinet J. Commitment issued.

Respondent's Exhibit "A"—(Continued)

1939

Jan. 27 Subpoena to Ruth McDowell returned served January 23, 1939. Subpoena to R. J. Steward returned served January 20, 1939 filed.

Subpoena to Irene Knickerbocker Arvale Tipper and George Wallgast returned served January 20, 1939 filed.

Subpoena to Bernice Smith, retd served Jan. 23, 1939, Ann Sheridan, Alex Costage and William Ekstein returned served January 21, 1939 filed.

Subpoena Duces Tecum returned served on Howard C. Knickerbocker, January 20, 1939 filed.

Jan. 28 Motion for New Trial as to Walter McDonald. Hearing February 18, 1939 filed. Motion for New Trial as to Otto Barnowski. Hearing February 13, 1939 filed.

Feb. 20 Answer of the US to Motion for New Trial filed. Hearing on Motion for New Trial continued to February 27, 1939.

Mar. 9 Commitment returned executed by delivering Defendants, Walter McDonald & Otto Barnowski, to Warden U.S. Penitentiary, Leavenworth, Kansas, March 3, 1939, filed.

Mar. 13 Order denying Motions for New Trial entered Moinet J.

June 30 Affidavit of Otto Barnowski filed.
Certified copies issued.

Respondent's Exhibit "A"—(Continued)

1939

- July 5 Affidavit of Walter McDonald.
Certified copies issued.
- Oct. 5 Praeceptum for certified copies filed, copies issued.

1943.

- Jan. 13 Verified Motion for Vacation of Erroneous and Void Sentence of Walter McDonald filed.
- June 12 Order Denying Motions of Walter McDonald for vacation of Erroneous and Void Sentence filed and entered. Moinet J. Book 75, Page 234.
- June 14 Petition for Writ of Habeas Corpus ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 75, Page 269.
Writ of Habeas Corpus Ad Prosequendum issued.
- June 30 Petition of Habeas Corpus Ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 76, Page 146.
Writ of Habeas Corpus Ad Prosequendum issued.
- July 15 Defendants Response to Government's Petition to vacate Judgment, etc. filed.
- Aug. 2 Petition of Walter McDonald to vacate Judgment heard in part and continued without date. Defendant waives counsel at this hearing. Moinet J.

Respondent's Exhibit "A"—(Continued)

1943

- Oct. 14 Certified copies of order of C.C.A. directing clerk to file a transcript of Record filed. Moinet J. Book 80, Page 247.
- Oct. 21 Order to set aside Sentence of Walter McDonald led and entered. Moinet J.
Defendant Walter McDonald sentenced to imprisonment under Count 2, for 25 years. Moinet J. Book 80, Page 461.
Commitment issued.
- Oct. 29 Praeceptum for additions to Transcript of Record filed.
- Dec. 7 Writ of Habeas Corpus Ad Prosequendum returned and filed.
Commitment for Walter McDonald returned and filed.

1944.

- Feb. 16 Mandate and Opinion on appeal of Walter McDonald filed. Moinet J. Book 85, Page 30.
- Apr. 3 Petition for Writ of Habeas Corpus Ad Prosequendum filed. Order allowing to be issued entered. Moinet J.
Writ of Habeas Corpus Ad Prosequendum issued for Otto Barnowski—Returnable.
- Apr. 13 Hearing on Petition of Otto Baranowski to reduce sentence, Continued to Apr. 20, 1944, so that defendant may secure counsel. Moinet J.

Respondent's Exhibit "A"—(Continued)

1944

Apr. 20 Hearing on Petition of Otto Baranowski to reduce sentence continued to Apr. 25, 1944. Moinet J.

Order appointing Hugh Francis, Counsel for Otto Barnowski entered. Moinet J. Book, Page [97]

Apr. 25 Motion for Otto Barnowski for correction of sentence filed.

Order setting aside former sentence of Otto Barnowski of Jan. 26, 1939, and sentencing defendant to imprisonment for 25 years to begin on Jan. 26, 1939. Moinet J. Book 87, Page 458.

Commitment issued.

May 2 Writ of Habeas Corpus Ad Prosequendum filed and entered. [98]

United States of America,
Eastern District of Michigan—ss.

I, George M. Read, Clerk of the United States District Court in and for the Eastern District of Michigan, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Plea, Verdict, Sentences (2) Docket Entries in the Matter of the United States of America vs. Walter McDonald, et al. Criminal Docket No. 24742 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto sub-

Respondent's Exhibit "A"—(Continued)
scribed my name and affixed the seal of the afore-
said Court at Detroit, Michigan, this 22nd day of
June, A.D. 1944.

[Seal]

GEORGE M. READ,

Clerk.

ELEANOR VAN LOON,

Deputy Clerk. [99]

Department of Justice
Washington

23414

May 15, 1943

To the Warden, U. S. Penitentiary, Leavenworth,
Kansas:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of Walter McDonald, #54615, from the U. S. Penitentiary, Leavenworth, Kansas, to the U. S. Penitentiary, Alcatraz, California.

Now, Therefore, you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official

Respondent's Exhibit "A"—(Continued)

in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the Warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,

JAMES V. BENNETT,

Director, Bureau of Prisons.

(Signed) FRANK LOVELAND,

Acting Assistant Director.

Safer Custody

Original.—To be left at institution to which prisoner is transferred.

A True Copy.

By C. W. SUNDSTROM,

Record Clerk, USP,

Alcatraz, Calif.

June 19, 1944. [100]

Respondent's Exhibit "A"—(Continued)

(Copy)

23414

Record of Court Commitment
Department of Justice
Penal and Correctional Institutions
United States Penitentiary
Alcatraz, California

Inst. Name: Walter McDonald. No. 602-AZ. Born 10-1-90. Age 53.

Alias Walter McDougal, William McDonnell, Walter Perkins. Color: Indian.

True Name: Inst. name.

Name and number of prior commitments to Fed. inst.: 54615-Leavenworth (same offense).

Offense: National Bank Robbery—armed.

District: E-D-Michigan-Detroit.

Sentence: 25 years.

Costs, Fine: None.

Sentence changed: Oct. 21, 1943. New term 25 Yrs. Sentence changed to 25 yrs. by reason thereof for new judg. & commitm't.

Sentenced: Jan. 26, 1939 (Original). Oct. 21, 1943 (Re-sentenced).

Committed to Fed. Inst.: March 3, 1939.

Sentence begins: Jan. 26, 1939.

Eligible for parole: May 25, 1947.

Eligible for conditional release with good time: Feb. 6, 1956* (With forfeit).

When arrested: March 28, 1938.

Respondent's Exhibit "A"—(Continued)

Where arrested: Detroit, Michigan.

Residence: Detroit, Michigan.

Time in jail before trial: Since arrest.

Rate per mo. good time: 10. Total good time possible: 3000 days.

Eligible for con. ref. with extra good time: Sept. 29, 1955 (With credit of 130 days industrial good time.

Forfeited good time: November 4, 1942*.

Amount forfeited: *Earned to June 1, 1944: (F) 90 days good time.

Expires full term: January 25, 1964.

Person to be notified in case of serious illness or death:

16674 USDB (Ft. Leav. (Military) Ft. Leavenworth, Kans. Name. Phillip Vincenti.

48704, State Penitentiary, Columbus, Ohio, Relation, Friend.

54458, State Penitentiary, Columbus, Ohio, Address 2709 Mt. Elliott, Detroit, Mich.

(Received at Alcatraz, May 20, 1943, in transfer from USP. Leavenworth, Kans.)

Releases and recommitments on present sentence other than parole:

3/7/41 To Ct. WHC & return.

3/27/41 To Ct. WHC & return.

7/23/43 To Ct. WHC-Detroit.

11/26/43 Returned to AZ.

3/8/39 Ohio Pen, Columbus, Ohio, Parole violation.

[Endorsed]: Filed July 5, 1944.

[Title of Court and Cause.]

TRAVERSE OF RETURN TO ORDER TO
SHOW CAUSE

The above-named petitioner, Walter McDonald, in answer to the return of James A. Johnston, Warden, to the order to show cause respectfully shows:

FIRST

That petitioner is unlawfully detained by Warden James A. Johnston in the United States Penitentiary on Alcatraz Island, California, by color of authority of a void sentence and illegal warrant of commitment rendered and issued without lawful jurisdiction by the United States District Court for the Eastern District of Michigan in a cause numbered 24742. Petitioner avers that said purported sentence and warrant of commitment under date of October 21, 1943, are absolutely void as a matter of law in that petitioner had fully served a former sentence for the same said offense on indictment numbered 24742. Said former sentence was begun on January 26, 1939, and the valid sentence on the only valid count thereof was concluded in May, 1943. (Petitioner's Exhibit A). Said second and unlawful sentence on said indictment numbered 24742 was imposed on October 21, 1943, which began to run "from and including this day." (Petitioner's exhibit B).

The sum of these two sentences exceeds 30 years which is in direct conflict with the applicable statute, 12 U.S.C.A., Section 588B(b). The double

jeopardy phase of this cause is fully treated in petitioners Brief.

Respondent's return to order to show cause substantiates the major averments of your petitioner. However, his minor variations are of lesser import in degree than substance. But the return as a whole reflects with sharp contrast devious circumlocutions to becloud the issue by misstatement of facts which is clearly apparent in the following particularity, to-wit: [102]

—A—

The respondent fails to append any signature to the return to the order to show cause or to verify the same by oath. 28 U.S.C.A. Section 457.

—B—

The respondent avers that the unlawful second sentence was modified by the Sixth Circuit Court of appeals on January 10, 1944. As a matter of truth and fact, to be verified by reference, the Sixth Circuit court of appeals on January 10, 1944, affirmed this said unlawful judgment, 139 F. (2d) 939. Then realizing this affirmance was in direct violation of petitioner's constitutional immunity to double jeopardy, it attempted to justify such extra judicial expediency by a deliberate violation of a Federal Statute in the following manner: McDonald vs. Moinet, 139 F. (2d) 941:

“The petitioner will be entitled to the benefits of all parole regulations and good time credits, as if the valid resentence had been pronounced on January 26, 1939, the date of the original sentence.”

This determination does not alter in the slightest degree the fundamental averment put in issue by petitioner. Its sole significance lies in the amazing fact that such ill advised conclusion is contrary to federal law being in diametric opposition to 18 U.S.C.A., Section 709a, para. 2;

"That with respect to federal prisoners sentenced after this act shall have become effective, deductions from the term of sentence for good conduct—shall be computed beginning with the day on which the sentence Commences to Run. (Emphasis supplied.)

The trial court's unlawful order of commitment dated October 21, 1943, by which petitioner is now illegally imprisoned, clearly and definitely states that the said second sentence begins to run "from and including that day," (Ex. B) October 21, 1943. How then can the Sixth Circuit court of appeals aver that the good time begins to run on the second sentence from January 26, 1939, four years and [103] nine months before said second sentence is imposed, in diametric opposition to 18 U.S.C.A., Section 709a, *supra*.

We do not, however, deem this point of any significance in the issue raised by petitioner's writ of habeas corpus. But respondent alleged that the sixth circuit court of appeals modified said unlawful second sentence. (Even though said second sentence was affirmed.) And this irrelevant point was, unquestionably, the only one to which respondent could have alluded. This analysis necessarily ensued.

—C—

The respondent's exhibit A, No. 4, is a false record and does not conform to the true record of the court commitment, of record October 21, 1943, (Petitioner's Exhibit B) in the following particularities, to wit:

True Record (Court)

Sentenced: Oct. 21, 1943.

Committed: Nov. 26, 1943.

Sentence begins Oct. 21, 1943.

Eligible for Parole: Feb. 21, 1952.

Cond. Release: Nov. 21, 1960 (with forfeit).

Expires full term: Oct. 20, 1968.

Respondent's Record (False)

Sentenced: Oct. 21, 1943 (re-sentenced).

Committed: Mar. 3, 1939.

Sentence begins Jan. 26, 1939.

Eligible for Parole: May 25, 1947.

Cond. Release: Feb. 6, 1956 (with forfeit).

Expires full term: Jan. 25, 1964.

SECOND

The court order of commitment is the only authority by which respondent Warden is empowered to detain a prisoner. By what recognized authority

may he deviate from the precise and express decree and order of the court governing his limited restraint of a prisoner to alter, modify, amend or change said court order which ensued as the logical result of purported lawful judicial process?

It should be noted with significant particularity that the first and second commitments clearly indicate the precise date upon which Each sentence begins to run. They are thus [104] in full concord with the essential requirements of the statute, 18 U.S.C.A., Section 709a, Para. 1. This vital fact clearly indicates the imposition of two separate and distinct sentences; the first of which petitioner has fully served and upon the second of which he is now being unlawfully detained.

CONCLUSION

This court may readily perceive that the various circumlocutions of respondent Warden indicate an attempted concealment of some unlawful proceeding through the effective operation of which, petitioner is being unlawfully detained on a second sentence for the same offense.

Petitioner therefore, earnestly prays this court to scrutinize this unusual cause with considered zeal and study it with particular care that right shall survive and justice prevail; and that the petition for Writ of habeas corpus be granted; and

petitioner be forthwith released from further unlawful custody.

(s) WALTER McDONALD,
Petitioner Pro. Se.

Subscribed and sworn to before me a Notary Public, this 25 day of July, 1944.

Records at U. S. Penitentiary, Alcatraz, California, indicate Walter McDonald is a citizen of the United States.

[Seal] (s) E. J. MILLER,
Associate Warden, United States Penitentiary, Alcatraz, California.

Warden—Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed July 26, 1944. [105]

[Title of Court and Cause—No. 23414-S.]

ORDER

After hearing upon a writ of habeas corpus heretofore issued on June 26, 1944, and upon due consideration of the testimony and arguments submitted to the Court for decision,

It Is Hereby Ordered:

1. The application of petitioner to be restored to his liberty is denied.

2. The writ heretofore issued on June 26, 1944, is discharged.

The United States Attorney may submit findings of fact and conclusions of law under the rules.

Dated: August 14, 1944.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 16, 1944. [106]

[Title of Court and Cause—No. 23441-S.]

AMENDED ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

It appearing that there was a clerical error in the order of this court in the above proceeding, dated August 14, 1944, the same is, in accordance with the provisions of Rule 60 FRCP, amended as follows:

1. The application of petitioner to be restored to his liberty is denied.
2. The order to show cause issued on June 26, 1944, is discharged.

Dated: August 29, 1944.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Sept. 5, 1944. [107]

[Title of Court and Cause—No. 23414-S.]

NOTICE OF APPEAL

Please take notice that the above-named petitioner hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California entered in the office of the clerk of said court on the 16 day of August, 1944, dismissing the petition for writ of habeas corpus herein, and from each and every part of said order as well as from the whole thereof.

WALTER McDONALD,

Pro se Box No. P.M.B. 602,

Alcatraz, California.

Dated August 18, 1944.

[Endorsed]: Filed Sept. 5, 1944. [108]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10882

WALTER McDONALD,

vs.

JAMES A. JOHNSTON, etc.

MANDATE

United States of America—[Seal]

The President of the United States of America

To the Honorable the Judges of the District Court
of the United States for the Northern District
of California, Southern Division, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of California, Southern Division, before you, or some of you, in a cause between Walter McDonald, petitioner, and James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, respondent, No. 23414-S, an order was duly filed on the 16th day of August, 1944, as amended by order filed on the 5th day of September, 1944, which said order is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and [110] as by the inspection of the Transcript of the Record of the said District Court, which was brought into

the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Walter McDonald, as appellant, against James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, as appellee, agreeable to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 6th day of March in the year of our Lord One Thousand Nine Hundred and forty-five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed. (April 2, 1945).

You, Thereby, Are Hereby Commanded that such further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 31st day of May, in the year of our Lord One Thousand Nine Hundred and forty-five and of the Independence of the United States of America the One Hundred and sixty-ninth.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed May 31, 1945. C. W. Calbreath, Clerk. [112]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 112 pages, numbered from 1 to 112, inclusive, to be a full, true and correct copy of the records and proceedings as enumerated in the Designation of Contents of Record on Appeal in the case entitled Walter McDonald, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary. Alcatraz, California, Respondent, No. 24885 S, on Habeas Corpus, as the same now remain on file and of record in the office of the Clerk of said Court, and that the same constitutes the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of preparing and certifying the foregoing Transcript of Record on Appeal is the sum of \$36.95, of which amount \$35.85 has been charged against the United States of America, and \$1.10 has been paid to me by the Attorney for the Cross-Appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 11th day of December, A.D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN,
Deputy Clerk. [113]

[Endorsed]: No. 11210. United States Circuit Court of Appeals for the Ninth Circuit. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. Walter McDonald, Appellee, vs. Walter McDonald, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed: December 12, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 11,210

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Appellant,
vs.

WALTER McDONALD,
Appellee.

AMENDED STATEMENT OF POINTS TO BE
RELIED ON IN APPEAL AND DESIGNA-
TION OF CONTENTS OF RECORD TO BE
PRINTED.

James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, appellant herein, hereby designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon by him on appeal:

(1) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, should have denied the petition for writ of habeas corpus filed by appellee before him;

(2) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, erred when he ordered the appellee discharged from the custody of the appellant.

(3) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, erred when he found the appellee had been denied the effective assistance of counsel dur-

ing the proceedings before the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, Cr. No. 24742;

(4) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, erred when he found that the appellee had been denied the effective assistance of counsel during the proceedings before the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, Cr. number 24742, without first issuing a writ of habeas corpus and producing the appellee before him for hearing to determine if the facts as alleged by appellee were true and to afford the appellant the opportunity to contravert the facts as alleged by the appellee.

(5) That the sentence imposed against appellee by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, Cr. No. 24742, is a valid, existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

(Signed) FRANK J. HENNESSY,
United States Attorney.

(Signed) JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Appellant.

[Endorsed]: Filed January 29, 1946. Paul P. O'Brien, Clerk.



No. 11,210

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON,

Warden, United States Penitentiary,
Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

OPENING BRIEF FOR APPELLANT.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California.

Attorneys for Appellant.

FILED

MAY 21 1946

PAUL P. O'BRIEN,



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No. 11,210

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON,

Warden, United States Penitentiary,
Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", discharging appellee from the custody of the appellant. (Tr. 73-78.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A., Sections 451, 452 and 453. Jurisdiction to review the order of the Court below is conferred upon this Court by Title 28 U. S. C. A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below discharging appellee from the custody of the appellant. (Tr. 73-78.) The appellee, an inmate of the United States Penitentiary at Alcatraz Island, California, filed a petition for writ of habeas corpus in which he alleged in substance that he was denied his constitutional right of effective assistance of counsel before the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called "the trial Court" and that accordingly his case was governed by the Supreme Court of the United States in

Glasser v. United States, 315 U. S. 60, and he was therefore entitled to his discharge from the custody of the appellant, the Warden of the said penitentiary. (Tr. pp. 2-68.) The Court below issued an order to show cause (Tr. 68), and appellant filed a return to the order to show cause (Tr. 69, 70) and the appellee filed a traverse to the return to order to show cause. (Tr. 70-71.) The Court below then entered an order appointing counsel for appellee (Tr. 72) and both counsel for appellee and for appellant submitted memoranda of points and authorities in support of their respective contentions. Thereafter the Court below, without first issuing a writ of habeas corpus and producing the appellee before it for hearing to determine if the facts alleged by appellee were true and to afford the appellant the opportunity to controvert the facts as alleged by the said appellee, concluded that the appellee had been denied effective

assistance of counsel during the proceedings before the trial Court, that his case fell within the class of cases contemplated by

Glasser v. United States, supra,
and entered the following order:

“MEMORANDUM AND ORDER DENYING
MOTION TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS AND RE-
MANDING THE CASE AGAINST PETI-
TIONER TO THE DISTRICT COURT OF
MICHIGAN FOR FURTHER PROCEED-
INGS.

Petitioner seeks release from the United States Penitentiary at Alcatraz upon the ground that he was denied his constitutional right of assistance of counsel at the time of his trial upon the charge for which he is imprisoned.

Petitioner with another defendant was indicted in the District Court of the United States for the Eastern District of Michigan, Southern Division, charged with violation of Title 12 USCA ss 588b(a) and 588b(b). Each was found guilty and was sentenced on January 26, 1939 to a term of imprisonment of 35 years.

Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed.

Petitioner contends that his case is governed by *Glasser v. United States*, 315 U. S. 60.

Respondent in moving to dismiss contends that petitioner knew of this point, which he now raises for the first time, when he filed his petition, No. 23414-S which was denied by this Court on August 29, 1944 (affirmed 149 F. (2d) 768), and that he is therefore barred from asserting the point under *Swihart v. Johnston*, decided by the Ninth Circuit Court of Appeals on August 6, 1945. Respondent also urges that the very point petitioner now raises, namely that he was denied assistance of counsel was decided adversely to him in 113 F. (2d) 984 and 129 F. (2d) 196, and that this Court should follow the ruling of the Tenth Circuit Court.

In the *Glasser* case, *supra*, *Glasser*, a former Assistant United States Attorney was found guilty of conspiracy to defraud the United States and appealed. At the time of trial *Glasser's* counsel was appointed by the court to represent one of the codefendants. *Glasser* objected to the appointment of his attorney to represent a co-defendant, but the appointment was made and the trial had. The Supreme Court said, page 70: “* * * we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one’s own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U. S. 45, so are we clear that the

"assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired. * * * We are told that, since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. *Johnston v. Zerbst*, 304 U. S. 458, 464. But it is by no means conclusive. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. * * * The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.' The conviction of Glasser was set aside and he was remanded to the court for a new trial.

The language of the *Swihart* case, *supra*, relied on by respondent, is to the effect that if facts are

known to the petitioner and they are not alleged in his first petition he should not be allowed to file another petition based upon the same matters, for 'to reserve them for use in a later proceeding "was to make an abusive use of the writ of habeas corpus" '. The court said: 'Each petition is to be disposed of in the exercise of a sound judicial discretion guided and controlled by whatever has a rational bearing on the propriety of the discharge sought. One of the matters which may be considered and given controlling weight is prior refusal to discharge on a like petition'. The rule stated may be invoked where there is a repetitious filing, but if the point raised by the petitioner is one which affects his substantial legal rights, although known and not urged in a prior petition, the trial court should take judicial cognizance of it.

As we have seen, the point of assistance of counsel has not been heretofore raised in this court by petitioner. And respondent points out that in *McDonald v. Hudspeth*, 113 F. (2d) 984 and in *McDonald v. Hudspeth*, 129 F. (2d) 196 the Circuit Court of Appeals for the Tenth Circuit decided that petitioner did have assistance of counsel. The first case was decided before the Supreme Court's decision in the *Glasser* case. The second case was decided after, but there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the *Glasser* case or its decision would have been otherwise.

Here we have a layman charged with a serious crime who informs the court that he has had diff-

erences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald) Glasser is disclosed by the record before us.'

Applying the ruling in the Glasser case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the 'requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.' *Johnston v. Zerbst*, 304 U. S. 458, 468.

In conformity with the rule mentioned in *In re Bommer, Pet.*, 151 U. S. 242, 261, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, for further action by that Court.

It is therefore Ordered:

1. That Walter McDonald, petitioner herein, be and he is hereby remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of

Michigan, Southern Division, for further proceedings on the said indictment.

2. The motion to dismiss is Denied.

Dated: September 20, 1945.

A. F. St. Sure,
United States District Judge."

(Tr. pp. 73-78.)

From the order discharging the appellee from his custody, the appellant appeals to this Honorable Court. (Tr. 78-79.)

CONTENTIONS OF APPELLANT.

The five points designated by the appellant as the grounds to be relied on by him on appeal (Tr. 132-133) may be summarized as follows:

(1) The Court below should have issued a writ of habeas corpus and produced the appellee before it for hearing to determine if the facts as alleged by appellee were true and to afford the appellant the opportunity to controvert the facts as alleged by the appellee.

(2) The Court below should not have concluded that the appellee was denied the effective assistance of counsel before the trial Court and ordered appellee discharged from the custody of appellant.

ISSUES OF THE CASE.

Did the Court below act properly in adopting the procedure which it followed, and if so, was the decision it reached, the correct one?

ARGUMENT OF APPELLANT.

It must be conceded that the mere filing of a petition for writ of habeas corpus, whether verified or unverified, does not import truth to its allegations, nor is such verity imported by the issuance of an order to show cause or by the filing of a return to order to show cause. In fact the filing of the return puts in issue every material allegation of the petition, and if a cause of action has been stated, a writ of habeas corpus must of necessity issue, the petitioner produced before the Court and a hearing held, so that it may ascertain the truth or falsity of the disputed allegations and draw the proper conclusion from such determination of the facts.

Dorsey v. Gill, 148 F. (2d) 857, 866, 870, 871;

Walker v. Johnston, 312 U. S. 275, 284.

In *Holiday v. Johnston*, 313 U. S. 342, 354, it was said by the Supreme Court of the United States:

“The District Judge should himself have heard the prisoner’s testimony, and in the light of it, and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the Judge, which the statute plainly accords him.”

It therefore logically follows that if under the statute the appellee must be accorded the right to be heard by the Court below, the privilege of controverting the allegations of the appellee must be afforded to the appellant.

Appellant admits that if there is a single exception to the above-stated rule, such exception is correctly set forth in

Dorsey v. Gill, supra, at pages 869, 870,
wherein the Court citing

Salinger v. Loisel, 265 U. S. 224, 232;

Pope v. Huff, 141 F. (2d) 727, 728;

Beard v. Bennett, 114 F. (2d) 578, 581;

Wells v. United States, 318 U. S. 257, 260,
and other authorities upon which appellant herein also relies, declares:

"It is apparent, therefore, that the words of the statute—from the petition itself—include information, available to the judge by judicial notice, to which the allegations of the petition refer, or upon which they depend; it is the duty of the judge to look through the petition, to the record, in order that he may discover such information; having done so, the exercise of sound judicial discretion may require that the petition be dismissed or leave to file it denied. In fact, this power and duty of the judge extends not only to the records of his own court, but to those of other courts as well."

This doctrine of the effect of the filing of a prior petition, upon an instant petition, so clearly enunciated in

Dorsey v. Gill, supra,
finds sanction in later decisions of this Court, and
more particularly in

Swihart v. Johnston, 150 F. (2d) 721,
cited subsequently in
Garrison v. Johnston, 151 F. (2d) 1011.

In view of the foregoing decisions, it is now possible to see the only conceivable theory under which the Court below acted in reaching the conclusion that appellee had been denied the right of effective assistance of counsel before the trial Court without first issuing a writ of habeas corpus and holding a hearing thereon. It took judicial notice of the record in an earlier habeas corpus proceeding instituted by the appellee, decided adversely to him, of necessity conceded the facts as found by the District Court of the United States for the District of Kansas and affirmed by the Circuit Court of Appeals for the Tenth Circuit in these proceedings,

McDonald v. Hudspeth, 129 F. (2d) 196,
to be true; but while adopting these facts as a correct statement as to what had actually transpired before the trial Court, it reached an opposite conclusion from that of these Courts. Otherwise how could the Court below have possibly been justified in speaking, as it did, in its memorandum and order, of what "the undisputed facts show" (Tr. 73), in view of this unquestioned rule of law set forth in

Dorsey v. Gill, supra, at page 871:

"When such a petition, accompanied by a request for leave to file, is presented to a trial

judge he must determine its sufficiency, with respect both to law and fact, not only upon the allegations well pleaded, but upon the whole record. For this purpose the record in the earlier proceedings imports verity; it is treated as part of the record in the later proceeding; and only to the extent that the allegations of the petition in the later proceeding are consistent with the record, will they be assumed to be true."

Accordingly, in determining whether appellee had been denied effective assistance of counsel before the trial Court, and thus had been deprived of due process of law, the record in

McDonald v Hudspeth, supra,

must be carefully scrutinized rather than the allegations in the instant petition. Such scrutiny will of course show that the facts, as found by the Court below, are practically supported by the record in

McDonald v. Hudspeth, supra,

but the Court below should have made additional findings. Said the Court below in its opinion:

"Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed." (Tr. 73.)

Said the Circuit Court of Appeals for the Tenth Circuit in

McDonald v. Hudspeth, supra at pages 198 and 199,

“The trial Court found that petitioners (McDonald and his codefendant) were represented by Mr. Curran, competent counsel of their own choice, * * *; that McDonald did not state to Judge Moinet (the trial Judge) the nature of his disagreement with Curran, did not ask for a continuance, and did not request that another counsel be appointed; that Judge Moinet gave McDonald full opportunity to state the nature of his disagreement, but that the only statement made was that McDonald had had some disagreement with Curran; that no request was made by petitioners or their counsel for process for witnesses; that at no time during the trial did petitioners make any complaint to the Court respecting the conduct of their defense by Curran; that McDonald did not state to Judge Moinet that he had filed charges against Curran with the Michigan State Bar Association * * *.”

Whether the facts as found by the Court below are similar or particularly similar, or otherwise, to the facts as found in

McDonald v. Hudspeth, supra, the important consideration is, that for purpose of this appeal the Court below adopted the findings of fact as established in this prior habeas corpus proceeding, but as indicated, reached the opposite conclusion, and did so under the authority of

Glasser v. United States, supra.

Thus, in the final analysis, this Honorable Court is called upon to decide whether the action of the Court below, or the action of the Circuit Court of Appeals for the Tenth Circuit, should be sustained. The Court below, however, did not believe that its action in holding that appellee had been denied due process of law, as contemplated by the Sixth Amendment, was tantamount to a reversal of the decision of the Circuit Court of Appeals for the Tenth Circuit, for, as it said in its opinion:

“And respondent points out that in *McDonald v. Hudspeth*, 113 F. (2d) 984 and in *McDonald v. Hudspeth*, 129 F. (2d) 196 the Circuit Court of Appeals for the Tenth Circuit decided that petitioner did have assistance of counsel. The first case was decided before the Supreme Court’s decision in the *Glasser* case. The second case was decided after, but there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the *Glasser* case or its decision would have been otherwise.” (Tr. 76.)

The appellant is reluctant to challenge the assertion of the Court below, that the attention of the Circuit Court of Appeals for the Tenth Circuit was probably not called to the ruling of the Supreme Court of the United States in the

Glasser case, *supra*,

“or its decision would have been otherwise.” Appellant, however, respectfully insists that the decision in the *Glasser* case was before the Circuit Court of

Appeals for the Tenth Circuit when it rendered its own decision in

McDonald v. Hudspeth, supra.

This Honorable Court, taking judicial notice of the entire record in

McDonald v. Hudspeth, supra,

will find that the *Glasser* case was argued before the Circuit Court of Appeals for the Tenth Circuit and was cited by the petitioner in his opening brief at pages 9, 15 and 16, and in his unsuccessful motion for rehearing.

Now there can be no argument on the following score: the Court below decided that the appellee was denied effective assistance of counsel before the trial Court and based its decision solely on the ruling in the *Glasser* case, supra, because it said in its memorandum ordering the discharge of the appellee:

"Applying the ruling in the *Glasser* case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the 'requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.' *Johnston v. Zerbst*, 304 U. S. 458, 468.

In conformity with the rule mentioned in *In re Bonner*, Pet., 151 U. S. 242, 261, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, for further action by that Court." (Tr. 77.)

The Circuit Court of Appeals for the Tenth Circuit, however, did not believe that the proceedings before the trial Court brought this case within the framework contemplated by the *Glasser* case, *supra*, although it made no reference to the *Glasser* case in its opinion, and sustained the District Court of the United States for the District of Kansas in concluding that,

“The petitioner was not denied the assistance of competent counsel for his defense.”

McDonald v. Hudspeth, *supra*, at page 198.

And of paramount importance is the fact that the Supreme Court of the United States in these proceedings denied certiorari,

317 U. S., 665.

This, then, is the crux of this appeal: does the ruling in the *Glasser* case, *supra*, cover the situation as presented in the case at bar? Appellant respectfully contends that it does not and that under its authority appellee is not entitled to his discharge from the custody of the said appellant.

While the decision in the *Glasser* case, *supra*, seems to indicate that the defendant is entitled to effective assistance of counsel, it does not follow that the mere fact he was represented by an attorney against whom he had preferred charges with the Grievance Committee of the State Bar shows he did not receive competent legal assistance. In the *Glasser* case, *supra*, the Supreme Court took great pains to point out that *Glasser* was in fact deprived of competent and effective assistance of counsel by the Court's appointment

of his counsel to represent another defendant. Instances occurring during the trial were referred to by the Court to illustrate the prejudice to Glasser through his attorney being required to represent two clients. There is nothing in the record which shows that anywhere during the trial of the case at bar appellee was prejudiced by having to accept the services of his counsel or that his attorney did not in fact defend him to the best of his ability. In fact the Circuit Court of Appeals for the Tenth Circuit in

McDonald v. Hudspeth, *supra*,

indicates, as already shown, that the defendant received competent and unprejudiced assistance by counsel who represented him. In

Dorsey v. Gill, *supra*, at page 876,

it was said:

“Everyone who is acquainted with the realities of practice knows the desire of some convicted persons to have their cases tried over again and their frequent repudiation of counsel after their hopes for acquittal or for lenient punishment have failed to materialize. It is easy for such a person to rationalize his own wishful thinking—together with hopeful comments of counsel—into a structure of promises, coercion and trickery; to assume incompetency and disinterest or worse, upon the part of counsel. But mere general assertions of incompetency or disinterest do not constitute a *prima facie* showing required by the statute to support a petition for habeas corpus. District attorneys and assigned counsel are officers of the court; licensed to practice, upon proof of character and fitness to perform professional du-

ties. There is a presumption of proper performance of duty by each of them, which requires much more than the allegations of the present case to set the procedure of habeas corpus in motion."

SUMMARY.

None of the allegations of appellee in his petition are deemed true, except as they are consistent with the record of

McDonald v. Hudspeth, supra.

If the findings of fact, as made by the District Court of the United States for the District of Kansas and affirmed by the Circuit Court of Appeals for the Tenth Circuit in

McDonald v. Hudspeth, supra,

are deemed as true, the Court below acted improperly in concluding from these facts that, as a matter of law, the appellee was denied his right to effective assistance of counsel before the trial Court.

Appellant is glad to rest on the record in

McDonald v. Hudspeth, supra,

and with that understanding he concedes that no writ of habeas corpus need issue and hearing held thereon. Under any circumstances the Court below acted improperly in ordering appellee discharged from the custody of appellant.

CONCLUSION.

This Honorable Court should conclude from the record that the appellee was not denied the effective assistance of counsel before the trial Court and should remand the cause to the Court below with instructions that the petition for writ of habeas corpus be dismissed.

In the alternative, this Honorable Court should remand the cause to the Court below with instructions that it issue a writ of habeas corpus and hold a hearing thereon.

Accordingly the decision of the Court below ordering the discharge of the appellee from the custody of the appellant was improper and should therefore be reversed.

Dated, San Francisco, California,

May 20, 1946.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellant.

No. 11,210

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON, etc.,

Appellant and Cross-Appellee
(Respondent Below),

VS.

WALTER McDONALD,

Appellee and Cross-Appellant
(Petitioner Below),

BRIEF OF APPELLEE AND CROSS-APPELLANT
(Petitioner Below).

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FILED

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PAUL P. O'BRIEN, v

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES A. JOHNSTON, etc.,

Appellant and Cross-Appellee
(Respondent Below),

VS.

WALTER McDONALD,

Appellee and Cross-Appellant
(Petitioner Below).

BRIEF OF APPELLEE AND CROSS-APPELLANT
(Petitioner Below).

**STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING BASIS OF COURTS' JURISDICTION.**

This is an appeal by the appellant, respondent below, taken on September 21, 1945 (R. 78), from an order of the District Court below (R. 73) refusing to dismiss a petition for a writ of habeas corpus and remanding the appellee, cross-appellant herein and petitioner below, to the U. S. Marshal to be returned to the U. S. District Court for the Eastern District of Michigan for further proceedings upon a 1938 indictment charg-

ing him with a felony. The appeal has been consolidated with the cross-appeal of the appellee taken on October 24, 1945 (R. 86), from said order and from the minute order of the Court below denying his motion to amend said order.

The District Court below had jurisdiction of the proceeding under the provisions of Title 28 USCA, secs. 451, 452 and 453, and the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction to review final orders of the Court below under the provisions of Title 28 USCA, secs. 463(a) and 225(a) (first).

The pleadings necessary to show the existence of the jurisdictions are the petition for the writ (R. 2), the order to show cause (R. 68), the return to the order to show cause (R. 69), the traverse to the return to the order to show cause (R. 70), memorandum and order denying motion to dismiss the petition and remanding petitioner to Michigan (R. 73), the motion to amend the remanding order (R. 80), the order denying the motion to amend the remanding order (R. 84), the appellant's notice of appeal (R. 78) and the cross-appellant's notice (R. 86) of cross-appeal.

STATEMENT OF THE CASE.

Walter McDonald, appellee and cross-appellant herein and petitioner below, was indicted jointly with one, Barnowski, on May 4, 1938, in the U. S. District Court in Michigan. On June 10, 1938, he was ar-

raigned, without counsel, and entered a not guilty plea to the indictment which charged him with the commission of bank robbery. On January 25, 1939, the defendants were tried by jury and found guilty. Both defendants were represented by the same attorney at the trial. On the following day McDonald was sentenced to 35 years imprisonment. He has been in prison ever since, presently being incarcerated in the federal penitentiary at Alcatraz, California, where he is restrained of his liberty by the respondent as the Warden of said prison. He filed a petition for a writ of habeas corpus in the Court below (R. 2) alleging the restraint to be illegal because the judgment of conviction out of which it arose was void because he was deprived of his right to the assistance of counsel in the trial proceeding. An order to show cause issued on the petition. (R. 68.)

The respondent's return to the order to show cause (R. 69) admits all the facts alleged in the petition but prays a denial thereof because a prior application for a writ (R. 125) made by the petitioner in proceeding No. 23,414 had been denied by the Court below.* The petitioner filed a traverse thereto. (R. 70.) Consequently, the only defense to the application is that tendered by the return to the order to show cause and this is limited to a question whether the issue raised by the petition is foreclosed because proceeding No. 23,414 had been resolved against him.

*The petition in No. 23,414 (R. 89) tendered issues different from the instant one. It attacked the validity of a sentence for duplicity. It was denied (R. 126) and the denial was affirmed on appeal by this Court in *McDonald v. Johnston*, 149 Fed. (2d) 768.

Thereafter the Court below, by a memorandum opinion (R. 73), refused to dismiss the petition and made a finding that the petitioner had been deprived of his right to counsel in the Michigan trial proceeding and ordered him remanded to the custody of the United States Marshal to be returned to the Michigan District Court for further proceedings on the indictment. The respondent appealed. (R. 78.) Thereafter, the petitioner moved the Court below to amend the findings and judgment under Rule 52 R.C.P. so as as to provide for the discharge of the petitioner. (R. 80.) This motion was denied for want of jurisdiction in that Court to pass upon the merits of the motion occasioned by the filing of the respondent's notice of appeal. (R. 84.) Thereafter, the petitioner cross-appealed from said remanding order and from the minute order denying his motion to amend it. (R. 86.) Thereafter he moved this Court to dismiss the appeal upon the ground that it had been taken from an interlocutory order and this Court denied the motion.

QUESTION INVOLVED.

Can a Court, sitting in habeas corpus, refuse to discharge a petitioner held under an unlawful commitment and order him remanded to a committing Court in another jurisdiction to stand trial on an indictment charging bank robbery when he has been unlawfully imprisoned under a void judgment of conviction for eight years and has not been and now cannot be accorded his constitutional guaranty of a speedy trial thereon?

SPECIFICATION OF ERRORS.

The cross-appellant specifies as error and intends to urge the Court below erred in failing to order the cross-appellant discharged from custody and in ordering him (R. 73) remanded to the custody of the U. S. Marshal to be returned to the U. S. District Court for the Eastern District of Michigan for further proceedings on a 1938 indictment against him and in denying his motion (R. 84) to amend said order so as to provide for cross-appellant's discharge from custody.

ARGUMENT.

PROCEDURE IN HABEAS CORPUS PROCEEDINGS.

There is no authority whatever supporting the respondent's assertion that a writ must issue and a hearing be had in habeas corpus proceedings. On the contrary, the first judicial action to be taken on a petition is to determine its sufficiency and to dismiss it "if it appears from the petition itself that the party is not entitled" to an award of the writ. Title 28 USCA, sec. 455. No writ issues in such a case and no hearing is held thereon.

If the petition states grounds for an award of the writ the Court issues a writ of habeas corpus or, in the alternative, an order (rule) to show cause thereon. If the writ issues the respondent may do one of two things. He may produce the petitioner in Court which, in itself, is an answer to the writ necessitating the introduction of evidence or he may file a return thereto

controverting the facts and produce the petitioner in Court whereupon a hearing on the factual merits ensues, the petitioner being entitled to file a traverse to the return. See 28 USCA, secs. 456-460.

The function of the writ, as recited on its face, is to cause a disclosure of the reasons for the detention and the production of the body of the prisoner in Court. It serves no other purpose. The disclosure of the reasons for the detention is to enable the Court to determine from the pleadings whether factual issues require hearing and a determination. The production of the body of the prisoner is designed to transfer custody of the prisoner from the jailor to the Court. If a prisoner's rights can be determined on the pleadings without his presence in Court being necessitated and without the testimony of witnesses being taken why should a Court order him produced and then waste time going through the perfunctory formality of listening to testimony on ultimate facts which are not disputed? The appellant herein contends such a hearing is required. The cross-appellant contends the law does not require such a performance.

If an order to show cause issues in lieu of the writ the respondent does not produce the body of the petitioner but files a return to the order to show cause which the applicant may traverse. This practice is authorized. See *Walker v. Johnston*, 312 U. S. 275. The return to the order puts in issue the sufficiency of the application. If it then appears from these pleadings that there is no provable cause of action the petition is dismissed. But if it then appears that the

application is sufficient and the return thereto admits or fails to deny the material facts the prisoner is entitled to an order releasing him from custody without a hearing on the facts being required. There is no necessity for a writ issuing in such a case unless the respondent refuses to obey the releasing order. If the respondent refuses to obey the order the Court may direct the issuance of the writ. Thereupon the respondent, in obedience to the writ, produces the petitioner in Court. The custody of the body of the petitioner thereupon passes from the respondent to the Court and the Court may release the petitioner from its own custody without going through the useless formality of a hearing on the merits, there being no factual issues requiring a hearing.

Warden James A. Johnston is an officer of national reputation and would obey a releasing order. If he were to refuse to honor the order the writ would issue and the petitioner would be delivered into the custody of the Court by the respondent and thereupon would be entitled to his discharge in open Court. (A refusal to comply with the order also might give rise to contempt proceedings.)

That a hearing is not required where there are no factual issues to be passed upon and matters of law alone are to be determined is demonstrated by the following paragraph in *Walker v. Johnston*, 312 U. S. 275, 284, viz.:

“It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it.

Since the allegations of the petition are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grants of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts and from uncontrovertible facts such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts."

In urging that the Court below should have directed a writ to issue and to have conducted a hearing on the facts the respondent tacitly concedes that the order below refusing to dismiss the petition and remanding the cross-appellant to Michigan was a mere interlocutory order. Consequently, we insist, on the strength of the rule announced in *Collins v. Miller*, 252 U. S. 354, that the respondent's appeal does not lie and must be dismissed for want of jurisdiction in this Court to entertain it. A similar conclusion is not reached as to the cross-appeal, however, for reasons pointed out in our motion to remand the cause with directions to the Court below.

NO TRIABLE ISSUES OF FACT EXISTED.

The respondent now asserts that the filing of a return of any nature whatever puts in issue every material fact of a petition. (See page 9 of his Brief.) Such of course is not the case. Those facts only which are denied are put in issue. His return raises the single defense that the petition was barred by the prior proceeding No. 23,414 which had been resolved against the petitioner. Whether the doctrine of *res judicata* applied to the case did not depend upon a hearing on facts. It was a simple matter of ascertaining from the face of the pleadings whether or not that issue had been raised and decided in the prior application. (As hereinafter argued, the doctrine of *res judicata* is inapplicable to habeas corpus proceedings in any event.)

The return to the order to show cause, by its failure to controvert the alleged deprivation of counsel, admitted the deprivation. In addition, the very proof mentioned in the return and upon which the respondent relied to prove there had not been a denial of counsel was the record in proceeding No. 23,414. However, that proceeding related to an attack upon the validity of a sentence and in nowise involved the question of a denial of counsel. (See R. 89, 97, 120, 125 and 128.) (The whole of that record has been incorporated in the Transcript of Record herein although it does not properly form a part thereof. It is, however, a matter of which the Court below had judicial cognizance.)

The respondent argues that the Court below could not take judicial cognizance that the return to the

order to show cause admitted the material facts alleged in the petition, an argument obviously without merit. He also argues that it could not take judicial notice that the pleadings in proceeding No. 23,414 which once had been before it did not involve a question of a denial of counsel. At the same time he insists it should have taken judicial notice that the petitioner's failure to assert a denial of counsel therein barred him from raising that point in his present application. We believe his contentions to be without merit.

THE COURT BELOW EXERCISED ITS DISCRETION IN REFUSING TO GIVE CONTROLLING WEIGHT TO DENIAL OF PRIOR APPLICATIONS.

Following the submission of the cause to the Court below the respondent learned that the petitioner had filed two prior applications for writs in District Courts in the Tenth Judicial District. In his points and authorities he urges that these applications, decided adversely to the petitioner, barred the petitioner's present application. His theory is that successive applications for the writ, although based upon different factual or legal grounds, are barred by a rule announced by this Court in *Swihart v. Johnston*, 150 Fed. (2d) 721. However, no such rule was announced therein. That opinion, following the rule established in *Loisel v. Salinger*, 265 U. S. 134, 137, announced that the doctrine of *res judicata* did not apply to habeas corpus proceedings and declared that a district judge might, in the exercise of his discretion,

consider and give controlling weight to "a prior refusal to discharge on a like petition". That rule was followed in *Beard v. Bennett* (CA-DC), 114 Fed. (2d) 578; *Pope v. Huff* (CA-DC), 141 Fed. (2d) 727; *Dorsey v. Gill* (CA-DC), 148 Fed. (2d) 857, 870. In accordance with that rule the Court below, in a proper exercise of its judicial discretion, gave ample consideration to the prior applications of McDonald and properly refused to give controlling weight to the prior refusals of the Courts to discharge him. Wherefore, we assert that this Court is not empowered to interfere with the exercise of the discretionary power lodged in the Court below. (*Hudson v. Parker*, 156 U. S. 277; *In re Parsons*, 150 U. S. 150; *Ex parte Brown*, 116 U. S. 401.)

In the *Swihart* case this Court expressed the erroneous opinion that a petitioner should not be permitted to reserve known issues to be raised in a later petition. However, in *Waley v. Johnston*, 316 U. S. 101, the Supreme Court recognized the right of a person to reserve questions to be raised in subsequent petitions. See also footnote in *Hawk v. Olson*, 66 S. Ct. 116, where the Supreme Court viewed the doctrine of *res judicata* and successive applications for the writ as having no bearing on a subsequent application. In *Kerr v. Squier*, 151 Fed. (2d) 308, 310, this Court, following the rule in the *Waley* case, modified its own opinion in the *Swihart* case, in the following language:

"the adjudication of a prior petition for release from imprisonment for the same crime, does not

make res judicata any matters there decided, much less make adjudicated all the rights to release which could have been but were not presented in that prior petition. *Waley v. Johnston*, 316 U. S. 101."

**SUCCESSIVE APPLICATIONS FOR THE WRIT
ARE PERMISSIBLE.**

In further answer to the contention that successive applications for the writ may not be made we direct attention to the fact that Section 9 of Article I of the Constitution prohibits the suspension of the privilege of the writ except when in cases of rebellion or invasion the public safety requires a suspension. No power is vested in the judicial branch of the government to suspend the writ by direction or indirection in any case whatsoever. That prohibition has as much constitutional dignity as has the vestiture of judicial power in the Courts. If Congress may broaden but not narrow the privilege of the writ it would seem to follow that the judicial branch may broaden but not narrow it. If Congress may not suspend the privilege of the writ whence does the judicial branch derive authority to suspend it upon a plea that it is empowered to legislate against successive applications for it? Nowhere in the long history of habeas corpus will it be found that successive applications for the writ were intended to be barred. The right to the great liberty writ lodged in the people is not one to be lightly refined away simply to serve judicial convenience.

What must not be lost sight of is that the constitutional prohibition against the suspension of the writ wisely was intended to safeguard in the judicial branch of government the power to discharge illegally held prisoners, the power being the judicial counterpart of executive pardoning power. Under the common law and by statute the application for the writ may be made to justices, judges and courts successively—it being intended that one in the line might grant a deserved relief even though the others might refuse it. Tom Mooney would not have suffered such a long period of imprisonment had applications for the writ been presented to successive judges and one have been impressed by the injustice done him. The right to entertain an application for the writ carries the judicial right to exercise a veto power over unjust imprisonment—in like manner as a jury exercises a veto power over unpopular law—and as does the President in the exercise of his pardoning power. Consequently, we view with increasing alarm the tendency of the Courts to strip the ancient privilege of the writ of its incidents and to destroy its efficacy.

THE FIRST APPLICATION.

The respondent urges (page 11 of his Brief) that the dismissal of the petitioner's first application for a writ (*McDonald v. Hudspeth* (CCA-10), 113 Fed. (2d) 984), operates as a bar to his present application. In that case the issue whether his detention in jail for

some ten (10) months preceding trial was repugnant to the 6th Amendment's guaranty of a speedy trial and to the due process clause of the 5th was decided against him. (The decision was clearly erroneous on that issue as a matter of law inasmuch as no power is lodged in a judicial division to nullify a constitutional guaranty. The opinion exhibits little judicial concern for McDonald's constitutional rights.) The issue of a denial of counsel was also raised and decided adversely to him. That decision was rendered on July 26, 1940, *before* the Supreme Court decided *Glasser v. U. S.*, 315 U. S. 60, on January 19, 1942. The decision was erroneous as a matter of law on this issue under the later decided *Glasser* rule.

Therefore, the respondent's argument is that the misapplication of a fundamental rule of organic law by a Court does not justify a prisoner thereafter from seeking relief therefrom. He also argues, at least impliedly, that when the Supreme Court decides a novel point of law or overrules a prior rule of law that those whose rights are affected thereby may not avail themselves of its benefits. Attention is drawn to the fact that although the Tenth Circuit Court's opinion reveals a denial of counsel in its narration of facts that Court drew the erroneous conclusion of law that no violation of the constitutional guaranty of counsel and of due process of law had occurred. The *Glasser* decision rendered its conclusions of law erroneous. Attention also is drawn to the fact that the right to an award of the writ and a discharge from custody depends upon the validity of the detention at the time

the matter is passed upon by the Court. See *Mensevich v. Tod*, 264 U. S. 134, 137, where the rule is stated as follows:

“The validity of a detention questioned by a petition for habeas corpus is to be determined by the condition existing at the time of the final decision thereon. *Stallings v. Splain*, 253 U. S. 339, 343.”

Consequently, the validity of the detention of McDonald is determined at the present time by the rule of law recently announced in *Glasser v. U. S.*, 315 U. S. 60, and thereunder there can be no doubt that his detention is unlawful and that he is entitled to an absolute discharge from custody.

THE SECOND APPLICATION.

The respondent also urges that the dismissal of the petitioner's second application for the writ (*McDonald v. Hundspeth* (CCA-10), 129 Fed. (2d) 196, decided Aug. 4, 1942), which raised the same issues as had been raised in the earlier case, 113 Fed. (2d) 984, bars his present application. In its opinion that Appellate Court sets forth facts showing an unmistakable denial of counsel but that Court, nevertheless, drew the conclusion of law that no violation of the constitutional guaranties of counsel and due process occurred. The decision was rendered *after* the Supreme Court decided the *Glasser* case. That Court overlooked the application of the *Glasser* rule and, consequently, its decision was erroneous as a matter of law. The re-

spondent (on page 15 of his Brief) asserts that the Glasser decision was mentioned in the opening brief of the petitioner which was filed in that Court. However, we conclude, as did the Court below, that the Tenth Circuit Court overlooked the Glasser opinion in deciding the case and that its oversight resulted in its erroneous decision. To conclude otherwise would seem to charge the Tenth Circuit Court with lawlessness in defying the decision of the Supreme Court in the *Glasser* case. While we do not believe the Tenth Circuit Court to be infallible we do not think it deliberately would defy the Supreme Court's announced rule, consequently, we assert it persisted in error because it, too, possesses human attributes.

**THE COURT BELOW PROPERLY TOOK JUDICIAL NOTICE
OF PRIOR ERRORS OF LAW.**

There can be no doubt that the Court below had judicial knowledge that the denial of counsel was admitted by the respondent's pleadings and that the recitals of the petition for the writ (R. 2) and of its exhibits (R. 9, 30 and 31) were true. There would seem to be no doubt that it was authorized to take judicial notice of proceeding No. 23,414 which had been before it and of this Court's opinion in *McDonald v. Johnston*, 149 Fed. (2d) 768, on the appeal therefrom. That proceeding did not involve the issue raised in the present appeal. There would also seem to be no doubt that the Court below properly took judicial notice of the factual recitations in the opinions of the Tenth

Circuit Court in the two prior cases entitled *McDonald v. Hudspeth*, 113 Fed. (2d) 984 and 129 Fed. (2d) 196, which demonstrates a deprivation of the right to counsel. See *Wells v. U. S.*, 318 U. S. 257, 260. There would also appear to be no doubt that the Court below was authorized to take judicial cognizance of the rule announced in the *Glasser* case, *supra*, and no doubt that it was its duty to apply that rule to the case at bar.

The respondent (appellant herein) now asserts the recitations of fact in the appellate opinions on the two prior applications of the petitioner, both of which demonstrate a deprivation of counsel, are true but that the erroneous conclusions of law drawn therein bar the present application and that, therefore, a hearing on facts proven therein and admitted by the pleadings herein is required herein. We are at a loss to learn what purpose such a hearing would serve. It is evident the respondent could not deny the fact of the deprivation of counsel and, consequently, admitted it by his pleadings herein.



THE JUDGMENT OF CONVICTION BEING VOID AND INCURABLE THE PETITIONER MUST BE DISCHARGED.

Where an accused person is deprived of his substantive constitutional right to counsel the trial Court loses jurisdiction over the cause at the time of the deprivation and a judgment of conviction subsequently entered therein is void. (*Johnson v. Zerbst*, 304 U. S.

458, 468, following the rule announced in *Frank v. Mangum*, 237 U. S. 309, 327; *Powell v. Alabama*, 287 U. S. 45; *Glasser v. U. S.*, 315 U. S. 60.) An application for a writ of habeas corpus is a proper remedy to pursue to obtain a discharge from detention where the illegality of the commitment arises from a deprivation of counsel. (*Johuson v. Zerbst*, *supra*; *Walker v. Johnston*, 312 U. S. 275, 286; *Hawk v. Olson*, 66 S. Ct. 116.)

It is the general rule that a defective sentence is curable. This cure is dependent upon whether the Court seeking to correct it has jurisdiction over the cause and over the person of the defendant. McDonald is in the custody of the federal authorities in California; the trial Court is situated in Michigan. The trial Court has no jurisdiction over him for want of his presence and none over the cause because the term of Court in which he was illegally convicted and sentenced expired some eight (8) years ago. The Court below had jurisdiction over him in habeas corpus but none over the cause in which he was convicted. It is not an agent of the trial Court. It cannot delegate its own duties or jurisdiction to the trial Court. See *Holiday v. Johnston*, 313 U. S. 342, 352. It cannot bestow upon the trial Court the jurisdiction that Court lost. Consequently, the Court below could not remand its cause to Michigan, could not revive the jurisdiction the trial Court lost and could not return McDonald to Michigan because, in habeas corpus, the jurisdiction of the Court is limited to ordering or refusing a discharge.

A return of the prisoner to Michigan would not empower the Michigan Court to disturb the verdict, judgment of conviction or the sentence imposed upon him because the term of Court in which they were entered long has expired. See *U. S. v. Mayer*, 235 U. S. 55, 67, so deciding as to a judgment of conviction, and *U. S. v. Benz*, 282 U. S. 304, 307, so deciding as to a sentence. In *Bryant v. U. S.* (CCA-8), 214 Fed. 51, an illegal sentence was said to be correctible whether or not the trial Court's term had expired. The reason assigned for that conclusion was that Bryant had elected to pursue his immediate remedy for release from custody through the instrumentality of an application for a writ of habeas corpus and thereby "put in motion the machinery" which prevented a correction of the sentence by the usual method of an appeal from the judgment or by a motion to vacate or amend the same. Attention is drawn to the fact that McDonald was not responsible for the error which voided the judgment and did not "put in motion" any machinery preventing the correction of the void judgment and sentence as Bryant had done. He attacked the validity of the sentences imposed upon him. See *McDonald v. Moinet* (CCA-6), 139 Fed. (2d) 939, an opinion on appeal from an order denying his motion to vacate sentences. Consequently, the trial Court alone was responsible for the void judgment and the Tenth Circuit Court was responsible for the failure to order his discharge in habeas corpus.

The remedy by habeas corpus is designed to avoid the effects of a void judgment of conviction. It neither

modifies nor revises the judgment of conviction. Its purpose is not to set aside the judgment but to release the prisoner from detention, leaving the judgment undisturbed. It does not perform the office of a writ of error or appeal. (*McNally v. Hill*, 293 U. S. 131, 139; *Harlan v. McGourin*, 218 U. S. 442.) Obviously, a Court sitting in habeas corpus in California cannot correct, modify or alter the void judgment of conviction and the void sentence entered in Michigan. It has no jurisdiction over the trial proceeding whatever. It has no power to interfere with that proceeding. It cannot restore to that Court the jurisdiction it lost.

The most that a Court sitting in habeas corpus is empowered to do is to discharge a prisoner from custody. It is settled that where a commitment arises out of a defective sentence it must order the prisoner discharged. It may notify the committing authorities of the time and place it intends to discharge the prisoner whereupon those authorities may take what steps they may wish and, if authorized, may arrest him or commence extradition proceedings against the prisoner. (*In re Bonner*, 151 U. S. 142; *In re Medley*, 134 U. S. 160-164; *Biddle v. Thiele* (CCA-8), 11 Fed. (2d) 235, 237; *In re Christian*, 82 Fed. 885.) (In *Price v. Zerbst* (DC-Ga.), 268 Fed. 72, 74, the Court misconstrued the Bonner decision as authorizing a petitioner to be remitted to a trial Court for correction of a sentence. In *McCleary v. Hudspeth* (CCA-10), 124 Fed. (2d) 445, 447, the Circuit Court fell into the same error as is apparent from each citation it sets forth for its conclusion.)

Obviously a court sitting in habeas corpus is not authorized to treat a petition for the writ as though it were an application for the extradition of the petitioner. If it does it exceeds its jurisdiction and the result is an extension of the wrongful imprisonment of the petitioner. Such a Court is not authorized to initiate extradition proceedings or proceedings in the nature thereof against a restrained person. It has no statutory authority to act as a volunteer agent of the committing authorities. The order below remanding McDonald to Michigan is invalid for being an unauthorized attempt to extradite him.

The rule appears to be settled that a Court must order the discharge of a prisoner in habeas corpus proceedings where a sentence is void. Although it may notify the committing authorities of the time and place of the intended discharge no appellate opinion is to be found declaring that such a notification should be given where a judgment of conviction is void. In the instant case such a notification would be of no value or importance, except for statistical purposes, inasmuch as the trial Court is barred from trying McDonald upon the indictment because, by reason of the elapse of time, he cannot now be granted the speedy trial to which he was entitled in 1939. A trial some eight (8) years after his arraignment would violate the speedy trial guaranty of the 6th Amendment and the due process guaranty of the 5th Amendment.

Where a judgment of conviction, as distinguished from a mere sentence, is void the rule seems to be that

it is the duty of a Court sitting in habeas corpus to order the prisoner discharged. See *Ex parte Nielsen*, 131 U. S. 176; *McNally v. Hill*, 293 U. S. 131, 137-139; *In re Bonner*, supra; *In re Medley*, supra; *Ex parte Novotny* (CCA-7), 88 Fed. (2d) 72, 74; *Mackey v. Miller* (CCA-9), 126 Fed. 161; *Ex parte Sharp* (DC-Kan.), 33 Fed. Supp. 464, and *Walker v. Johnston*, 312 U. S. 275. The reason therefor seems to be that a remand of the cause to the trial Court and a return of the prisoner to its jurisdiction is improper and purposeless inasmuch as the trial Court is not empowered to correct a void judgment of conviction. In the *Bryant* case a remand for correction of a sentence was held proper because the defect "did not inhere in the trial or verdict". The opinion indicates that a remand would be improper in a case involving a void conviction. In *U. S. ex rel. Nortner v. Hiatt* (DC-Penn.), 33 Fed. Supp. 545, 546, where a writ of habeas corpus was applied for on the ground the trial Court had deprived the petitioner of counsel it was held that the Court, sitting in habeas corpus, could not remand him "to the custody of the court which sentenced him" but, following the *Bonner* rule, would notify the committing authorities of the time and place it intended to discharge him from custody. In *In re Bonner*, 151 U. S. 142, it was recognized that a prisoner would be entitled to a discharge absolute where a judgment of conviction was not subject to correction, the Court there stating:

"In some cases, it is true that no correction can be made of the judgment, as where the court had, under the law, no jurisdiction of the case,—that

is, no right to take cognizance of the offense alleged,—and the prisoner must then be entirely discharged; * * *.”

It is apparent that the trial Court is not empowered to retry McDonald upon the indictment or to take any action thereon. That Court lost jurisdiction over the cause at the time it deprived him of the assistance of counsel in 1939. McDonald has been unlawfully imprisoned for some eight (8) years without having been accorded the type of trial guaranteed by the 6th Amendment. In short, he has been imprisoned for that period of time without a trial. Further proceedings upon the indictment are barred by the speedy trial guaranty of the 6th Amendment and the due process clause of the 5th Amendment. Compare *In re Alpine*, 203 Cal. 731, 736, 265 Pac. 947; *Harris v. Municipal Court*, 209 Cal. 55, 285 Pac. 699, and *In re Gergerow*, 133 Cal. 349, 354.

CONCLUSION.

The verdict, judgment and conviction and sentence under which McDonald is committed are void because the trial Court lost jurisdiction over the proceeding by virtue of the deprivation of counsel for which it alone was responsible. The petitioner was not responsible for the lost jurisdiction. He has, nevertheless, been held in jail for years awaiting such a trial on a criminal charge as is guaranteed by the 6th Amendment and the due process clause of the 5th Amendment. He

has not been given such a trial. In 1939 he was subjected to a psuedo-trial violating the constitutional guaranty. As a result he has been jailed unlawfully for eight years without trial. The Michigan trial Court now cannot proceed on the indictment against him inasmuch as to do so would violate the speedy trial provision of the 6th Amendment and the due process clause of the 5th Amendment. It is the duty of the Court in habeas corpus to discharge him from detention.

Wherefore we submit that the Court must order the petitioner discharged from custody either with or without notice being given the Michigan authorities of the time and place of his discharge or remand the cause to the Court below with instructions so to do.

Dated, San Francisco, California,

June 17, 1946.

Respectfully submitted,

WAYNE M. COLLINS,

*Attorney for Appellee
and Cross-Appellant.*

United States
Circuit Court of Appeals

For the Ninth Circuit.

C. F. LYTLE CO., an Iowa corporation, GREEN CONSTRUCTION CO., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation,

Appellants,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased,

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington

Northern Division

FILED
FEB 20 1946

PAUL P. O'BRIEN,
CLERK

No. 11217

United States
Circuit Court of Appeals

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C. F. LYTLE CO., an Iowa corporation, GREEN CONSTRUCTION CO., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

Proctors for Appellants:

MESSRS. MATTHEW STAFFORD and
G. H. BUCEY of Merritt, Summers, Bucey
& Stafford,
840 Central Building,
Seattle 4, Washington.

Proctor for Appellee C. M. Whipple:

MR. J. CHARLES DENNIS, United States
Attorney,
1017 U. S. Court House,
Seattle 4, Washington.

Proctor for Appellee Clark Nutt:

MR. L. M. KOENIGSBERG,
508 Central Building,
Seattle 4, Washington.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

In Admiralty—No. 14797

C. F. LYTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation,
and UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Maryland corporation,
Libelants,

vs.

C. M. WHIPPLE,

Respondent.

LIBEL

The libel of C. F. Lytle Co., an Iowa corpora-
tion, Green Construction Co., an Iowa corporation,
and United States Fidelity & Guaranty Com-
pany, a Maryland corporation, against C. M. Whip-
ple in a cause civil and maritime for review of
an order of the United States Compensation Com-
mission under Public Law 208 of the 77th U. S.
Congress, Act of August 16, 1941, as amended,
alleges:

I.

That C. F. Lytle Co. is a corporation organized
under the laws of the State of Iowa and having its
principal place of business in the State of Iowa;
that Green Construction Co. is a corporation or-
ganized under the laws of the State of Iowa and
having its principal place of business in the State
of Iowa; that United States Fidelity & Guaranty

Company is a corporation organized under the laws of the State of Maryland and having its principal place of business in the State of Maryland, but qualified to do and doing business in the State of Washington. That during the year 1942 libelants C. F. Lytle Co. and Green Construction Co. were engaged together in a joint venture in the prosecution of a contract with the United States of America; that the work under such contract was subject to the provisions of Public Law 208 of the 77th U. S. Congress, Act of August 16, 1941, as amended; that the underwriter of the obligations under that law of said joint venture was United States Fidelity & Guaranty Company, hereinabove described.

II.

That C. M. Whipple is and was on July 3, 1945, the duly appointed, qualified and acting Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission with his office located in Seattle, King County, Washington, and in the judicial district of the United States of America in which this suit is brought; that the said Fourteenth Compensation District includes the Territory of Alaska, U.S.A.

III.

That on June 26, 1942, William Earnest Nutt met his death at or near Big Delta, Territory of Alaska, U.S.A.; that for some time prior to June 26, 1942, William Earnest Nutt had been employed

by the joint venture hereinabove described in the prosecution of the contract hereinabove described; that said William Earnest Nutt left surviving him no widow but did leave surviving him three minor children; that on June 14, 1943, a claim for compensation under Public Law 208 of the 77th U.S. Congress, Act of August 16, 1941, as amended, was filed in the office of respondent Deputy Commissioner by Clark Nutt, guardian of said three minor children of William Earnest Nutt, namely, Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt.

IV.

That after the claim described in the last preceding paragraph had been filed in the office of respondent Deputy Commissioner the claimant and libelants herein through their respective counsel had stipulated in writing that respondent Deputy Commissioner could and should consider as the record in this case (a) a transcript of the testimony taken at a coroner's inquest held at Fairbanks, Alaska, on June 29, 1942, before the Honorable William N. Growden, United States Commissioner and Ex-Officio Coroner in and for Fairbanks Precinct of the Fourth Judicial Division of the Territory of Alaska, United States of America; and (b) the depositions consisting of transcripts of written interrogatories and answers thereto of Messrs. A. A. Lyon, William H. Green, Ralph Green, and Robert Nine, all of which transcripts

were filed in the office of said Deputy Commissioner C. M. Whipple.

V.

That after said stipulation was made and after said transcripts had been filed in the office of said respondent Deputy Commissioner, on July 3, 1945, said respondent Deputy Commissioner filed in his office the compensation order and award of compensation of which a copy is hereto attached and by this reference made a part hereof as fully as though set out herein verbatim; that the C. F. Lytle Co., Green Construction Co., and United States Fidelity Guaranty Company named in said compensation order and award of compensation are identical with the libelants in this suit.

VI.

That the record hereinabove described remains in the possession of respondent Deputy Commissioner as his record in this case and will be filed in this court and in this proceeding by said respondent Deputy Commissioner. That by this reference to said record libelants incorporate said record in this libel as fully as though set out herein verbatim.

VII.

That the compensation order and award of compensation of July 3, 1945, hereinabove described, a copy of which is hereto attached, is not in accordance with law because the record upon which this compensation order and award of compensation is based contains no substantial evidence that

the death of William Earnest Nutt arose out of and in the course of his employment and because the same record establishes affirmatively that the death of William Earnest Nutt was occasioned solely by the intoxication of said William Earnest Nutt.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore, the libelants pray that a citation according to the practice of this court may be issued against the said C. M. Whipple citing him to appear and answer on oath the matters aforesaid; and that this honorable court may be pleased to decree the suspension and setting aside in its entirety, by injunction or otherwise, of the compensation order and award of compensation made and filed by respondent herein on July 3, 1945; and that libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

HAYDEN, MERRITT, SUMMERS &
STAFFORD, MATHEW STAFFORD
and A. W. MURRAY.

MATTHEW STAFFORD,
A. W. MURRAY,

Proctors for Libelants.

United States of America,
State of Washington,
County of King—ss.

A. W. Murray, being first duly sworn on oath deposes and says: That he is Attorney and Supt. of Claim Dept. of the United States Fidelity and Guaranty Company, a Maryland corporation, and that he makes this verification for and on behalf of said libelant; that this deponent has had personal direction of the investigation and litigation of the claim of William Earnest Nutt described in the foregoing libel and that the allegations contained in said libel are true to the best of his knowledge, information and belief; that this deponent verifies this libel for the reason that no officer of the United States Fidelity & Guaranty Company is within this district.

A. W. MURRAY.

Subscribed and sworn to before me this 19th day of July, 1945.

[Seal] MATTHEW STAFFORD,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Jul. 19, 1945.

[Title of District Court and Cause.]

LIBELANT'S STIPULATION FOR COSTS

Whereas, a libel and complaint was filed in this court on the 19th day of July, 1945, by C. F. Lytle Company and Green Construction Company and

United States Fidelity and Guaranty Company against C. M. Whipple, Deputy United States Compensation Commissioner for the reasons and causes in said libel mentioned, and the said C. F. Lytle Company and Green Construction Company and United States Fidelity and Guaranty Company, Libelants, and the American Surety Company of New York, as Surety, parties hereto, hereby consent and agree that in case of default or contumacy on the part of the Libelant or their surety, execution may issue against their goods, chattels and lands for the sum of Two Hundred Fifty Dollars (\$250.00).

Dated this 19th day of July, 1945.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of Whom It May Concern:

That the stipulators undersigned shall be and are bound in the sum of Two Hundred Fifty Dollars (\$250.00) conditioned that C. F. Lytle Company and Green Construction Company and United States Fidelity and Guaranty Company, Libelants, above named shall pay all costs as shall be awarded against them by this Court, or in case of appeal, by the Appellant Court.

[Seal] AMERICAN SURETY COM-
PANY OF NEW YORK.

By J. A. HODSON,
Resident Vice-President.

Attest:

K. F. WARRACK,
Resident Asst. Secretary.

[Endorsed]: Filed July 19, 1945.

[Title of District Court and Cause.]

APPLICATION FOR INTERLOCUTORY IN-
JUNCTION STAYING PAYMENT OF AN
AWARD

Come now C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity & Guaranty Company, a Maryland corporation, libelants herein, and apply for an interlocutory injunction allowing the stay of all payments required to be made by the terms of that certain compensation order and award of compensation heretofore on July 3, 1945, made and filed by respondent C. M. Whipple, Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission in his case No. DB-14-655-11 under Public Law 208 of the 77th United States Congress, Act of August 16, 1941, as amended, and in support of this application show and offer to prove, on hearing, that an irreparable damages will otherwise ensue to libelants herein by reason of the following facts:

1. That said compensation order and award of compensation, a copy of which is attached to the libel in this suit, which libel by this reference is hereby made a part hereof as fully as though set out herein verbatim, requires the libelants herein forthwith to pay to Clark Nutt the sum of \$1767.82 and hereafter to continue payments to said guardian at the rate of \$11.26 a per week; that said compensation order and award of compensation

further requires libelants herein forthwith to pay to Clark Nutt as an individual the sum of \$200.00.

2. That said libelants and petitioners herein are informed and believe that if said payments are made and that if thereafter said compensation order and award of compensation is suspended and set aside by this court, the amount so paid cannot be recovered from the payee.

Wherefore, these libelants and petitioners pray that this court issue an interlocutory injunction herein allowing libelants to stay all payments under the compensation order and award of compensation herein described pending final decision of the suit in which this interlocutory injunction is sought.

HAYDEN, MERRITT, SUMMERS &
STAFFORD, MATTHEW STAFF-
FORD and A. W. MURRAY.

MATTHEW STAFFORD,
A. W. MURRAY,

Proctors for Libelants.

United States of America,
State of Washington,
County of King—ss.

A. W. Murray, being first duly sworn on oath deposes and says: That he is Attorney and Supt. of Claim Dept. of the United States Fidelity & Guaranty Company, a Maryland corporation, and that he makes this verification for and on behalf of said libelant; that this deponent has had personal

direction of the investigation and litigation of the claim of William Earnest Nutt described in the foregoing application for interlocutory injunction staying payment of an award and that the allegations contained in said application are true to the best of his knowledge, information and belief; that this deponent verifies this application for the reason that no officer of the United States Fidelity & Guaranty Company is within this district.

A. W. MURRAY.

Subscribed and sworn to before me this 19 day of July, 1945.

[Seal] MATTHEW STAFFORD,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed July 19, 1945.

[Title of District Court and Cause.]

NOTICE OF APPLICATION FOR INTER-
LOCUTORY INJUNCTION

To Clark Nutt, as the legally appointed guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, minor children of William Earnest Nutt; and to J. O. Watson, Jr., their attorney; and to C. M. Whipple:

You Are Hereby Notified and please take notice that on July 30, 1945, at 10:00 A.M. or as soon thereafter as proctors can be heard, the undersigned proctors for libelants herein will bring on for hearing before the Honorable Judge John C. Bowen,

one of the judges of the above-entitled court, in his courtroom in the United States Court House, Seattle, King County, Washington, application of libelants herein for an interlocutory injunction allowing the stay of all payments under that certain compensation order and award of compensation heretofore made and filed on July 3, 1945, by C. M. Whipple, Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission in his Case No. DB-14-655-11, a copy of said application for interlocutory injunction being attached hereto and herewith served upon you.

Dated at Seattle, Washington, July 19, 1945.

HAYDEN, MERRITT, SUMMERS &
STAFFORD, MATTHEW STAF-
FORD and A. W. MURRAY.

MATTHEW STAFFORD,
A. W. MURRAY.

[Endorsed]: July 19, 1945.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

Court Room No. 1, Monday, August 6, 1945.

Honorable John C. Bowen presiding.

[Title of Cause.]

Now on this 6th day of August, 1945, Matthew Stafford, of Hayden, Merritt, Summers & Stafford,

appearing on behalf of libelant, this cause comes on for hearing on the libelant's application for Interlocutory Injunction. The same is called and denied.

[Title of District Court and Cause.]

DEFENDANT WHIPPLE'S MOTION TO
DISMISS LIBEL

Now comes the defendant, C. M. Whipple, Deputy Commissioner, United States Employees' Compensation Commission, by J. Charles Dennis, United States Attorney, and moves this Honorable Court to dismiss the libel herein for the following reasons:

1. That the libel herein does not state a cause of action and does not entitle the plaintiffs to any relief, nor does said libel state a claim against the defendant upon which relief can be granted;

2. That it appears from the libel, including the transcript of testimony, taken at the inquest before Honorable William N. Growden and the several depositions, all of which are made part of the libel by reference, that the findings of fact of the deputy commissioner in the compensation order filed by him on July 3, 1945, are supported by evidence and under the law said findings of fact should be regarded as final and conclusive;

3. That it appears from the libel, including the transcript of testimony and depositions above

referred to, that the compensation order filed by the deputy commissioner on July 3, 1945, complained of in the libel, is in all respects in accordance with law;

4. For such other good and sufficient reasons as may be shown.

/s/ J. CHARLES DENNIS,

/s/ HERBERT O'HARE,

Assistant United States At-
torney, Attorneys for C. M.
Whipple.

[Endorsed]: Filed Oct. 3, 1945.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by the parties hereto by their undersigned attorneys as follows:

That the record heretofore certified to this court by Honorable C. M. Whipple, Deputy United States Compensation Commissioner for the Fourteenth Compensation District as the record before him in the matter of the claim for compensation for the death of William Earnest Nutt, dated at Seattle, Washington, October 31, 1945, and listing forty-five separate documents (a copy of the certification being hereto attached and by this reference made a part hereof), shall be and is hereby agreed upon as the entire record which was submitted to the

United States Employees' Compensation Commission and particularly to said Honorable C. M. Whipple, Deputy Commissioner, in passing upon this claim.

It Is Further Stipulated that the record as so certified may become a part of the records and files herein for all purposes of this proceeding.

Dated at Seattle, Washington, November 5, 1945.

C. M. WHIPPLE,

By J. CHARLES DENNIS,

United States District Attorney.

By HERBERT O'HARE,

Assistant United States District Attorney.

Attorneys and Proctors for Respondent.

C. F. LYTLE CO.,

GREEN CONSTRUCTION CO.,

UNITED STATES FIDELITY

& GUARANTY CO.

By MERRITT, SUMMERS, BUCEY
& STAFFORD.

By MATTHEW STAFFORD,

Attorneys and Proctors for Libelants.

L. M. KOENIGSBERG.

By H. S. SANFORD,

For Claimant-Intervenor.

[Endorsed]: Filed Nov. 5, 1945.

United States Employers' Compensation Commission Longshoremen's and Harbor Workers' Compensation Act, Fourteenth Compensation District District, 300 Colman Building, First Avenue and Marion Street, Seattle 4, Washington.

CERTIFICATION

I hereby certify that the record before me in the matter of the claim for compensation for the death of William Earnest Nutt, now on appeal in *C. F. Lytle Company, Green Construction Company, and United States Fidelity & Guaranty Company, libellants, v. C. M. Whipple, respondent*, Admiralty No. 14797, W. D. Wash. N. D., consists of the following described documents attached hereto on each of which I have affixed the number corresponding with that of its description set forth below:

1. A full, true and correct copy of Letters of Guardianship in the Guardianship of Phyllis Elaine Nutt, et al, Minors, No. 6237.

2. Form US-262, Claim for Compensation in Death Case, filed on June 14, 1943, by Clark Nutt, Guardian of Phyllis, Kenneth and Raymond Nutt, Minors.

3. Form US-262, Claim filed by Clark Nutt individually for money expended for funeral expenses.

4. Preliminary Statement filed by J. O. Watson, Jr., Attorney for Minor children of William Earnest Nutt, Deceased, and Attorney for Clark Nutt, claimant for burial expense.

5. Letter to Deputy Commissioner W. A. Marshall, dated August 27, 1943, from J. O. Watson, Jr., Attorney.

6. Copy of letter to A. W. Murray, U. S. Fidelity and Guaranty Company, dated August 27, 1943, from J. O. Watson, Jr., Attorney.

7. Letter to Deputy Commissioner W. A. Marshall dated September 1, 1943, from A. W. Murray, U. S. Fidelity & Guaranty Co.

8. Letter to Deputy Commissioner W. A. Marshall, dated September 20, 1943, from A. W. Murray, U. S. Fidelity & Guaranty Co.

9. Copy of letter to J. O. Watson, Jr., dated September 21, 1943, from Deputy Commissioner W. A. Marshall.

10. Letter to Deputy Commissioner W. A. Marshall, dated September 27, 1943, from J. O. Watson, Jr.

11. Copy of letter to A. W. Murray, U. S. Fidelity & Guaranty Co., dated September 27, 1943, from J. O. Watson, Jr.

12. Copy of letter to J. O. Watson, Jr., dated October 15, 1943, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Company.

13. Letter to Deputy Commissioner W. A. Marshall, dated November 5, 1943, from J. O. Watson, Jr.

14. Copy of letter to Howard W. Hedgcock, U.

S. Fidelity & Guaranty Company, dated November 5, 1943, from J. O. Watson, Jr.

15. Letter to Deputy Commissioner W. A. Marshall, dated November 29, 1943, from J. O. Watson, Jr.

16. Copy of letter to Howard W. Hedgecock, U. S. Fidelity & Guaranty Company, dated November 29, 1943, from J. O. Watson, Jr.

17. Letter to Deputy Commissioner W. A. Marshall, dated December 20, 1943, from J. O. Watson, Jr.

18. Copy of letter to Howard W. Hedgecock, U. S. Fidelity & Guaranty Company, dated December 20, 1943, from J. O. Watson, Jr.

19. Letter to Deputy Commissioner W. A. Marshall, dated January 10, 1944, from J. O. Watson, Jr.

20. Copy of letter to Howard W. Hedgecock, U. S. Fidelity & Guaranty Company, dated January 10, 1944, from J. O. Watson, Jr.

21. Letter to Deputy Commissioner W. A. Marshall, dated January 19, 1944, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Co.

22. Copy of letter to J. O. Watson, Jr., dated September 8, 1944, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Company.

23. Letter to Deputy Commissioner W. A. Marshall, dated October 26, 1944, from J. O. Watson, Jr.

24. Copy of letter to J. O. Watson, Jr., dated November 1, 1944, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Co.

25. Letter to Deputy Commissioner W. A. Marshall, dated November 30, 1944, from J. O. Watson, Jr.

26. Copy of letter to J. O. Watson, Jr., and U. S. Fidelity & Guaranty Company, dated December 4, 1944, from Deputy Commissioner W. A. Marshall.

27. Letter to Deputy Commissioner W. A. Marshall, dated December 5, 1944, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Company.

28. Letter to U. S. Fidelity & Guaranty Co., dated December 6, 1944, from Deputy Commissioner W. A. Marshall.

29. Letter to U. S. Fidelity & Guaranty Co. and J. O. Watson, Jr., dated February 15, 1945, from Deputy Commissioner C. M. Whipple.

30. Letter to Deputy Commissioner C. M. Whipple, dated February 16, 1945, from Howard W. Hedgecock, U. S. Fidelity & Guaranty Co.

31. Letter to Deputy Commissioner C. M. Whipple, dated February 27, 1945, from J. O. Watson, Jr.

32. Letter to J. O. Watson, Jr., dated March 1, 1945, from Deputy Commissioner C. M. Whipple.

33. Letter to Deputy Commissioner C. M. Whip-

ple, dated April 6, 1945, together with application for Approval of Attorneys Fees and Brief and Argument.

34. Letter to U. S. Fidelity & Guaranty Co., dated April 10, 1945, from Deputy Commissioner C. M. Whipple.

35. Letter to Deputy Commissioner C. M. Whipple, dated April 12, 1945, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Company.

36. Letter to Deputy Commissioner C. M. Whipple, dated April 14, 1945, from J. O. Watson, Jr.

37. Letter to Deputy Commissioner C. M. Whipple, dated June 11, 1945, with attached Reply Brief and Argument, from Howard W. Hedgcock, U. S. Fidelity & Guaranty Co.

38. Copy of letter to J. O. Watson, Jr., dated June 16, 1945, from Deputy Commissioner C. M. Whipple.

39. Letter to Deputy Commissioner C. M. Whipple, dated June 15, 1945, with enclosed Rebuttal Brief, from J. O. Watson, Jr.

40. Transcript of proceedings before William N. Growden, United States Commissioner and ex-officio Coroner, Fairbanks Precinct, Fourth Judicial Division, Alaska, in the Matter of the Inquest upon the Body of William Earnest Nutt, deceased, at Fairbanks, Territory of Alaska, on June 29, 1942.

41. Deposition on written Interrogatories of A. A. Lyon.

42. Deposition on written Interrogatories of W. H. Green.

43. Deposition of written Interrogatories of Ralph Green.

44. Deposition of written Interrogatories of Robert L. Nine.

45. Compensation Order, Award of Compensation, filed July 31, 1945.

Seattle, Washington, October 31, 1945.

/s/ C. M. WHIPPLE,
Deputy Commissioner.

In the Commissioner's Court, Fairbanks Precinct,
Fourth Division, Territory of Alaska

In the Matter of the Inquest upon the Body of
William Earnest Nutt, Deceased. No. 176.

PROCEEDINGS

1942

June 29. I, William N. Growden, United States Commissioner and ex-officio Coroner in and for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, having been informed that William Earnest Nutt died under circumstances indicating suicide, thereupon issued an order for jury returnable at 2:00 o'clock P.M., June 29, 1942.

June 29. File & Enter Marshal's Return on Order for Jury, as follows:

United States of America,
Territory of Alaska—ss.

I Hereby Certify That I received the within Jury Order at Fairbanks, Alaska, on the 29th day of June, 1942, and that I served the same on the 29th day of June, 1942, at Fairbanks, Alaska, by summoning the following to act as Jurors in the above entitled case:

J. W. Siebenthaler, Fairbanks, Alaska;

James Mack, Fairbanks, Alaska;

Magnus Johnson, Fairbanks, Alaska;

O. P. Daun, Fairbanks, Alaska;

Franklin McGarvey, Fairbanks, Alaska;

George Bachner, Fairbanks, Alaska.

Dated at Fairbanks, Alaska, June 29, 1942.

J. A. McDONALD

U. S. Marshal

By PAT O'CONNOR,

Deputy

June 29. Issue Subpoena.

June 29. The above named jurors appeared in the Commissioner's Court Room at Fairbank's, Alaska, at the hour of 2:00 o'clock P.M. The jury were duly qualified and sworn, after which they

heard the sworn testimony of the following witnesses: James F. Browne, Otto Berg, Ray E. Johnston, Harold W. Johnston, Walter L. Whelchel, Arthur J. Schaible, M. D., and John J. Buckley.

The jury then proceeded to the Tye Funeral Home where they examined the body, after which they returned to the U. S. Commissioner's Court Room, and, after due deliberation, returned the following verdict: (Name of Court and Title of Cause) Verdict.

We, the members of the duly empanelled Coroner's Jury in the aforesaid inquest, after having heard the sworn testimony of the various witnesses; having diligently inquired into the circumstances surrounding the death, and having personally inspected the body of William Earnest Nutt, and being fully advised in the premises, respectfully submit our findings and verdict, as follows:

The name of the deceased is William Earnest Nutt whose residence is Big Delta, Alaska.

The time of his death was approximately 11 P.M., June 26th, 1942.

The place of his death was 4 miles south of Big Delta on Richardson Highway.

The deceased came to his death by means of head and neck injuries sustained by falling from truck.

We find no one responsible for his death.

In Witness Whereof, we have set our hands this
29th day of June, 1942, at Fairbanks, Alaska.

FRANKLIN McGARVEY
GEORGE BACHNER
JAMES P. MACK
J. M. SIEBENTHALER
O. P. DAUN
MAGNUS JOHNSON

I approve the above rendered verdict.

[Seal] WILLIAM N. GROWDEN
U. S. Commissioner and
Ex-Officio Coroner.

June 29. Enter return on subpoena, as follows:
United States of America,
Territory of Alaska—ss.

I Hereby Certify That I received the foregoing
subpoena on the 29th day of June, 1942, at Fair-
banks, Alaska, and served the same by reading and
showing the original and delivering a ticket contain-
ing the substance thereof to each of the within
named witness James F. Browne, Otto Berg, Ray
E. Johnston, Harold W. Johnston, Walter L. Whel-
chel, Arthur J. Schaible, M. D., Personally.

J. A. McDONALD,
U. S. Marshal

By JOHN J. BUCKLEY,
Deputy

United States of America,
Territory of Alaska,
Fairbanks Precinct—ss.

I, William N. Growden, United States Commissioner, do hereby certify that the above and foregoing is a full, true and correct transcript of the proceedings In the Matter of the Inquest upon the Body of William Earnest Nutt, Deceased, as set forth in the Inquest Docket as Cause No. 176 on page 153 thereof.

[Seal]

WILLIAM N. GROWDEN

United States Commissioner

In the Commissioner's Court for Fairbanks
Precinct, Fourth Division, Alaska
No. 176

In the Matter of the Inquest Upon the Body of
William Ernest Nutt, Deceased.

TRANSCRIPT OF TESTIMONY

The above inquest was held at 2:00 o'clock P.M. on June 29th, 1942, before the Honorable William N. Growden, United States Commissioner and Ex-Officio Coroner, in the above entitled Court at Fairbanks, Alaska, and the following is the transcript of the testimony in full.

WALTER WELCHELL,

being first duly sworn, testified as follows:

Examination by Harry O. Arend, Assistant U. S. Attorney:

Q. Your name is Walter Welchell, is it?

A. Yes.

Q. Where do you live?

A. Do you mean my former address.

Q. Now. Where you are now?

A. Big Delta.

Q. Were you acquainted with William Ernest Nutt?

A. Not before I came up here.

Q. How long had you known him up here?

A. About 3 or 4 weeks.

Q. Was he working with you?

A. Yes. I am greasing machinery there.

Q. When did you last see him alive?

A. The day he was killed.

Q. What day was that?

A. Friday, the 26th.

Q. The 26th is Saturday. No Friday. Where did you see him?

A. Down at Rika's Roadhouse.

Q. What was he doing there?

A. There were a bunch of fellows down there. He went down in a truck to load up a boat. Otto Berg and I came down. We were going to see two Indians to buy a bear hide. We knew the fellows that were there because they all work there. We had a bottle of beer with them—two or three bottles of beer, I think. When the other truck got ready to go home that the gang went down with, they didn't

(Testimony of Walter Welchell.)

want to go home. There was Ernest Nutt and Jack and Ray, brothers, that wasn't quite ready to go home so they went with us. We left there and went up to Jimmy Brown's cabin. We had two checks for him that the bookkeeper gave to us to take down to him. We all went up there. When we started home there was Otto Berg—he was driving, mechanic up there and myself, and Jimmy Brown—we were in the front seat and Ray Johnston and Jack Johnston and Ernest Nutt were in the back of the truck. Ray was sitting right on the box. Jack was sitting with his back up next to the cab sitting on the edge of the box, and Ernest was sitting flat on the bottom too. Just about two minutes before it happened I glanced back through the glass and they were all laughing and talking and that is the last time I saw him alive.

Q. Then after that what happened?

A. The road was smooth in that spot. We felt a jar in the truck but otherwise we would never have known to stop. We thought we must have hit something or bumped under the hind wheel.

Q. Who was driving? A. Otto Berg.

Q. What kind of vehicle?

A. '37 or '38 truck. Dump truck.

Q. There were three in the back and three in the front? A. Yes.

Q. Did you hear any shouts just before you felt this? A. No.

Q. You didn't? A. No.

Q. Did you see the body afterwards?

(Testimony of Walter Welchell.)

A. I didn't go back to look. I was about ten feet from it.

Q. What did all of you do that were left in the car?

A. Well, Jimmy and Ray stayed there with the body and Otto, Jack and myself went in to camp to notify Mr. Cole, the bookkeeper.

Q. Did all the others go back to examine the body after the accident?

A. No. Otto and Ray and Jimmy went back.

Q. You did not?

A. No. I didn't go. I was feeling kind of bad. I was afraid to look at him.

Q. How old a man was he, to your estimation?

A. Looked like he would be around 45—a tall fellow.

Q. Had he been quarreling with any of the men?

A. No, he was a quiet fellow—very easy to get along with.

Q. Did he have any worries? Did he ever express any? A. Not to me, no.

Q. Was he very drunk.

A. No. He was feeling good, but not drunk so he didn't know what he was doing. He crawled in the truck by himself.

Q. Can you attribute any cause to the accident, as to why he might—

A. No. I couldn't figure out how it could happen.

Q. You didn't see him leave the truck?

A. No.

(Testimony of Walter Welchell.)

Q. Will you give me the names of the two who were in back with him?

A. Ray and Jack Johnston. Jack was sitting right on the edge of the box—no, on the edge of the box with his back against the cab.

Q. Has the company any restrictions against carrying men in dump trucks? A. No.

Question by Coroner: The men in the back were sitting with their backs to the cab?

A. Just one. Ernest and Ray Johnston were sitting flat on the bottom of the box.

Mr. Arend: Where did this happen? You can place it on the highway?

A. I judge it to be—estimate it three or four miles on the other side of Big Delta—well, the Tanana River.

Q. At the Tanana River?

A. On the other side. They call it Big Delta there.

Q. Did any other cars pass you while you were at that point? A. No.

Q. No other cars. Are there any other questions? Was this on a straight of way of the road, or on a curve? A. I believe it was straight.

Q. Did you take any special notice of the spot where you were?

A. No. I was pretty well riled up.

Q. You are not sure it was a straight of way?

A. There was no curves there, I am pretty sure. Not right there.

(Testimony of Walter Welchell.)

Q. Did you return at a later time to the scene of the accident? A. No.

(Witness excused.)

DR. A. J. SCHAIBLE,

being first duly sworn, testified as follows:

Q. What is your full name?

A. A. J. Schaible.

Q. You are a registered physician and surgeon?

A. Yes.

Q. How long have you engaged in practice?

A. Since November of last year here in Fairbanks.

Q. Before that? A. Since 1935.

Q. Were you acquainted with William Ernest Nutt? A. Not before his death.

Q. You did not know him. Did you have occasion to view his body last weekend? A. Yes.

Q. What day?

A. Saturday afternoon, about 4, I believe.

Q. Where did you see the body?

A. At the Tye Funeral Home.

Q. Did you make a close examination?

A. Yes. I didn't do a regular autopsy or post mortem. I didn't cut into the body at all. But I felt around it. The man—there was evidence that he had died from some injury. The left side of his face was black and scarred and also the left side of his chest and marks on his left arm. I signed the

(Testimony of Dr. A. J. Schaible.)

death certificate as cerebral concussion from the skull fracture. I learned subsequently that right after he was found his neck was turned completely around but when I saw him rigor mortis had set in and when I tried to move his neck it wouldn't move. He had a swelling on the side of his neck. I am satisfied that a severe injury caused his death—the cutting off of the spinal cord or a skull fracture. If the jury wants a definite diagnosis I would suggest ex-raying the man and we can see then whether his neck was broken.

Q. It would reveal it?

A. It would reveal that the bones were broken. What killed the man is the cutting of the spinal cord. It is possible for even a dislocation to cut that cord and kill a man instantly.

Q. How old was he? A. About 40 or 45.

Q. How tall?

A. Quite tall. I would judge in the neighborhood of 6 feet. I didn't measure him. He was quite muscular.

Q. Have you any—can you give any opinion as to what would have caused the bruises?

A. A fall from a truck—a fall from the truck with the truck running over him or striking him could have.

Q. The injury couldn't happen in the truck?

A. No. I doubt it. He gave the impression as if he had been dragged. He had a bunch of marks on the chest. Abrasions were on him—a single blow over the head—I don't think so.

(Testimony of Dr. A. J. Schaible.)

Q. The bruises were all on the face?

A. On the left side and on the chest and on the arm, as I recall it.

Q. Any open wounds?

A. There were abrasions. Skin rubbed off.

Q. No such thing as a bullet wound or knife wound? A. No. Nothing like that.

Q. Were his eyes blacked at all. Was there swelling?

A. Yes, there was swelling over the left eye.

Q. It extended to the left eye, did it?

A. The left eye.

Q. You think that could have been made by the blow of a fist?

A. As I recall it, it had scratch marks as if he had hit something. A fist, you would expect to tear or you wouldn't expect the marks as you would get dragging a body over gravel. It didn't look like one single blow. It was something that jerked it.

(Witness excused.)

JOHN J. BUCKLEY,

being first duly sworn, testified as follows:

Q. Your name is John J. Buckley?

A. Yes, sir.

Q. You are the Chief Deputy Marshal for this Division? A. Yes, sir.

Q. Were you acquainted with William Ernest Nutt?

(Testimony of John J. Buckley.)

A. No, I wasn't. Not until after his death.

Q. Did you see his body after his death?

A. Yes, sir.

Q. On what day?

A. On Saturday. Last Saturday, June 27th.

Q. At what time? A. About 3 o'clock A.M.

Q. Where?

A. About 3 miles south of Big Delta on the Richardson Highway.

Q. In what kind of surroundings?

A. He was laying in the road with his feet toward the bank of the road, lying on the shoulder of the road with his head quite close to the travel marks on the road. As a matter of fact, it was right on the edge of the travel wear of the road. Lying with his face looking towards the woods on the right hand side of the road going out.

Q. Were his feet pointing to Fairbanks or towards Valdez?

A. Right at that spot I don't know the directions but he was on the right hand side of the road with his feet pointing toward the ditch.

Q. Right hand?

A. He was lying this way (motioning) with his feet toward the ditch. Right on the shoulder.

Q. More cross ways of the road?

A. He was directly across the road.

Q. Any part of his body in the road bed?

A. His head was on the outside of the regular travel of the road.

Q. Just outside?

(Testimony of John J. Buckley.)

A. You would have to turn out around him to get around. There were marks there where ears had travelled.

Q. Was anyone else there?

A. Jim Brown and Ray Johnston and the book-keeper for Lytle and Green. I don't recall his name.

Q. Did anyone else go out with you?

A. Mr. Growden, U. S. Commissioner and I and Patrolman Buster Anderson.

Q. Did you make an inquiry there as to the cause of this man's death?

A. Yes.

Q. What did you find?

A. I found out from Ray Johnston who was watching the body that they had been down to Big Delta and I found out later that they had been sent to Big Delta by the foreman to make some repairs on the boat which they had done and had been scheduled to go home about 8 or 8:30 in the evening. A man by the name of Otto Berg wasn't going back until later and these men, Nutt and the two Johnston brothers and one other decided to stay there and wait for Otto Berg. They had been drinking considerable and my information was that Nutt had drunk very heavily and had passed out. They put him in bed and he got up and seemed to be all right—got into the truck by himself and the three of them sat in the truck with their backs toward the cab. They travelled about three miles to where the body was when Ray Johnston said that Ernest Nutt made the remarks "There's a moose out there. Here's where I get off." The next thing they knew

(Testimony of John J. Buckley.)

he was gone, whether he fell out or jumped out. Johnston wasn't altogether sober. It appears that the ground at the point where he hit the ground was on a straight of way after they had gone around a small curve and had got out into the straight of way on the road and travelled 200 feet from the curve, and showed marks where he hit the ground apparently with his feet spread out. You could see where the ground was broke, and then evidently he went over on his head and face and slid on the ground. His right shoulder had a little bruise. His left side was all bruised and scratched and along his face where the flesh had hit, the gravel was ground into the side of his face. The body was warm when we got there. Both the Commissioner and myself looked for wounds on the body—picked up his head and I believe—we were certain his neck was broken because the neck was twisted around as though there was nothing there to hold it and we could feel what we thought was a broken vertebra—about the fourth vertebra from the skull. There was no other marks on the body except the evidence that he slid. I stepped that off from the place where he hit and the body had not been disturbed and it was about 20 feet. Otto Berg was questioned as to what speed he was travelling when he went around the curve and he said between 20 and 25 miles, and that was possible. After he got around this curve he felt the dual tire jump up in the air and strike the ground again. He stopped the car. He didn't know at the time that Nutt had gone over. He was

(Testimony of John J. Buckley.)

of the opinion that the dual tire on the right hand side of the car struck Nutt when he went over. The examination of the truck we made, the position Nutt was sitting, he couldn't have jumped out of the truck and been hit by the wheels. The car would be by him when he hit the ground. But that might be explained—that jar might be explained that when he got up he had to spring from the bottom of the truck to get out and he might have thought that was the jar. The clothing—he had on a slicker—one of these oil slickers—the marks on his left arm showed no imprint of any tire. Neither did his face or head or chest. You could see no marks at all of tire treads.

Q. Did you see the truck they were driving in?

A. Yes.

Q. Was there any possibility to fall between the body and the back of the cab?

A. No. The bed of the truck——

Q. You saw no evidence of tire marks on the body and in your opinion it wouldn't have been possible for him to fall under the back wheels if he jumped out.

A. If he jumped it would have been utterly impossible for him to strike the rear wheel. That was my opinion anyway because the truck bed is quite high—I think it is about four feet from the ground to the bottom of the bed of the truck then it has a ten-inch high box on it and above that a piece of wood to extend the box up higher. He would have to jump at least eighteen inches to spring over to

(Testimony of John J. Buckley.)

get away from it. By the time he hit the ground the truck would be by him.

Q. Did you see any evidence of foul play?

A. No.

Question by Jury: You think he went over the side of the truck?

A. He had to go out the side of the truck. The position showed that the first marks were on the right hand side outside the travel of the cars.

Q. You think he had been dragged?

A. I know he had been dragged—he skidded along the road.

Mr. Arend: He was dragged by his own force?

A. After he hit the ground, he collapsed, turned over and slid. Mr. Berg who was driving the truck at the time is almost certain in his own mind that the dual tire went over him, but there is no evidence that we can see and we looked for that after we talked to Berg, and we couldn't see any marks of the tire.

Q. Were any bones broken?

A. We couldn't find any. Only the neck. I tried his right ankle, the one he hit the ground with. There was no crunching of the bones and no fracture that we could feel.

(Witness excused.)

RAY JOHNSTON,

being first duly sworn, testified as follows:

Q. State your full name?

A. Ray Edward Johnston.

(Testimony of Ray Johnston.)

Q. Where do you live, Mr. Johnston?

A. Guernsey, Iowa.

Q. Where are you temporarily residing?

A. At Lytle and Green, Big Delta.

Q. Were you acquainted with William Ernest Nutt?

A. Yes, sir.

Q. How long had you known him?

A. Well, for the length of his stay out there—between 3 and 4 weeks.

Q. Did you see him last Friday, June 26th?

A. Yes, sir.

Q. Where did you see him at that time?

A. The last time I seen him—you mean alive?

Q. Yes. A. Was getting out of the truck.

Q. Where at?

A. Four or five miles north or south of Big Delta.

Q. At that time you saw him get out of the truck. What kind of truck?

A. V-8 dump truck. About a '39 or '40.

Q. Who all was in the truck?

A. There were 5 of us. Otto Berg, Jimmy Brown, Harold Johnston, Carl—I don't know Carl's last name—no, Walter. And myself.

Q. Where were you sitting at the time?

A. I was sitting in the left hand corner in the back of the truck on the floor.

Q. Who else was in the back?

A. Harold Johnston was sitting in the back and Ernie was sitting in the right side.

Q. Is Harold related to you?

(Testimony of Ray Johnston.)

A. My brother.

Q. Do they call him Jack?

A. That's right.

Q. Who was in the front? Who was driving?

A. Otto Berg was driving.

Q. Who was with him up in front?

A. Otto was driving and there was Walter and Jimmy Brown.

Q. How did Nutt get out of the car—truck?

A. He raised up and just stepped out—whether accidentally or how—but that's how he done it.

Q. You say he stepped out?

A. That's right.

Q. Did he have to make any effort?

A. No.

Q. Did you see him get up and get out?

A. Yes, sir.

Q. Will you demonstrate just how he did it?

A. He just got up and raised his foot over like that (demonstrating) and said "Let's get out and walk." I thought he was joking and didn't think he meant it.

Q. How fast was the car going?

A. I wouldn't think over 15 miles an hour.

Q. Did he make any other statement right at the time or just before?

A. Yes. He said just before that he saw a moose down there and said "Let's go get it." I pushed him back and said "These are rough roads. You'll fall out," and didn't think anything more of it.

Q. What did you do after he stepped out?

(Testimony of Ray Johnston.)

A. I jumped out of the back end and went back where he was lying.

Q. Did the car keep on going?

A. For a slight ways, yes.

Q. What did you find?

A. He was lying there on his back. I started to give him artificial respiration. I thought he had his breath knocked out.

Q. Did he hit himself on any part of the truck?

A. Not that I seen.

Q. Did you feel anything when he left the truck.

A. No, I didn't. When he left I grabbed the back end and jumped out.

Q. Can you give any reason for him acting like this? A. No. Any more than just joking.

Q. Had he been drinking? A. Slightly.

Q. Was he drunk?

A. I wouldn't say that he was, no.

Q. Is there anything you can add that would make it easier for the jury to determine the actual cause of the death?

A. I don't know what it would be.

Q. Did he seem to have any financial worries?

A. He was happy and laughing when he done that.

Q. Had you ever observed him drinking before that? A. I don't believe I ever have.

Q. He had never been drunk in your presence?

A. No.

Q. Do you think in your own mind that he knew what he was doing?

(Testimony of Ray Johnston.)

A. I think he knew what he was doing but I think he was just joking. I don't think he intended to go that far.

Question by Jury: Do you think when he stepped over the edge of the truck body he apparently thought that he would step out on the ground—was he in that sort of mental condition—so that his body could have turned over?

A. I don't think he figured on letting his foot go down there that far.

Q. He would have a tendency of stepping over the edge to bring him in a sort of revolving motion and the wheel might catch him if he was far enough ahead of the hind wheel? Were there any chains on the side of the truck?

A. I don't think there was. I don't believe there was a chain hanging on the side of the truck.

Question by Coroner: When he went over the side you saw him clear the bed of the truck?

A. Yes.

Q. He didn't hang to the truck?

A. He went real quick. I jumped out at the same time because I knew he had been hurt.

Question by Jury: When he hit the ground did he hit with his feet?

A. I thought he hit with his feet and then rolled over on his shoulder and head.

Mr. Arend: If he stepped out of there how did he happen to hit the ground so as to make an impression of both feet?

A. It is quite a ways from the side of the truck

(Testimony of Ray Johnston.)

to the ground. It is several feet down. Those things happen so quick it is hard for a person to see.

(Witness excused.)

OTTO BERG,

being first duly sworn, testified as follows:

Q. Your name is Otto Berg?

A. That's right.

Q. Where is your home?

A. Des Moines, Iowa.

Q. Where are you temporarily residing?

A. Here now?

Q. Yes. A. At the camp at Big Delta.

Q. Were you acquainted with William Ernest Nutt? A. Yes. Just on this job is all.

Q. About how long had you known him.

A. I have known him since—I would say about three weeks.

Q. Did you see him last Friday, June 26th?

A. That was the day of the accident?

Q. Yes. Where did you see him?

A. Well——

Q. Just before the accident?

A. Just before the accident. It was on account of the weather the plant was shut down most of that day. Of course we were tied down there pretty much so at one I was talking in the office with the man in charge and asked him about maybe taking this truck and going down to Delta and wanted to know if there

(Testimony of Otto Berg.)

was anything he wanted. He said "Well that little truck has to be taken down and weighed and I have some checks for Jimmy Brown. You can take those down to him and spend a little time down there", so this Walter Welchell, he asked if he could ride along and I said "Sure". We drove down to Delta and got the truck weighed and came back by the roadhouse and stopped and this gang that had gone down before to load the boat—I didn't know they were down there, and Nutt was one of the gang. Everybody was having a few beers and I drank a bottle of beer myself. The boys got in the truck that they came down there with except this Nutt and two Johnston brothers. They stayed because I was there with my truck and they could go back with it. I took the checks up to Jimmy—I know Jimmy from the camp and we talked for a little while. So the boys came up there. We got ready to start back—of course the fellows taking it as a matter of fact that they would ride in the truck so this Nutt and the two Johnston boys were in the back of the truck and I drove the truck and Welchell and Jimmy Brown were in the front with me. The boys had been drinking but there wasn't any of them that weren't able to get in the truck. They seemed to be feeling good and to be O. K. otherwise.

Q. What were they drinking, beer or whiskey?

A. Possibly both. I couldn't say. The fact of the matter is I got a bottle of beer and it was sitting on the table and somebody drank it. I went out and talked to Rika. I would say they were drinking a little of both. This is something—I can't make my-

(Testimony of Otto Berg.)

self responsible for it in any way and yet it gets you. Driving the truck you couldn't know—I did know when I started out they were all three sitting down in the truck and supposedly we had gone about 11 miles and we weren't driving fast and so far as I was concerned possibly I was just like I am now.

Q. What time of the day did the accident happen?

A. I would say that it was possibly getting right towards 11 o'clock.

Q. At night? A. Yes.

Q. How did you know there had been an accident?

A. That's the thing. I stopped that truck because I knew something happened. There was a jolt or a bounce or whatever you would want to describe it as. Something—what it was I don't know. Something had to call my attention that something had gone wrong. It was just like the truck made a jolt like it had run over a rock and that's what called my attention to stopping the truck and of course I stopped it right there. It flashed through and I wondered if something was wrong. I watch my road pretty close.

Q. Have you determined what caused the jolt?

A. No, I can't determine it.

Q. Were there any rocks in the road?

A. I have never been back there after.

Q. What happened after you stopped the car?

A. After I stopped the car why Ray Johnston was out of the truck and then just a short distance Nutt was lying in the road. We went back there and tried

(Testimony of Otto Berg.)

to give him artificial respiration and do all we possibly could. I knew the man was gone.

Q. What did you do then?

A. I left Ray Johnston and Jimmy Brown there with the body and took the other two boys with me and drove back into camp as fast as I could and told Mr. Cole who is in charge what happened.

Q. Did you go back to the scene of the accident?

A. No, I didn't go back. Naturally that is quite a thing.

Q. Were you there long enough to make an examination of the body?

A. Not any more than—I didn't try to examine the body but it seemed that the body on one side was hurt. I was under the impression that the man's neck was broken, but I am no authority on that.

Q. Did you see any tire tracks across the body??

A. No, sir.

Q. Did you hear any quarreling?

A. Not a bit. None whatever. I am speaking of something there. In my opinion, being right with the boys I am satisfied there was nothing of that kind. The three of them separated and stayed and naturally the three of them were piling it together. There was no quarrelling or arguments amongst them prior to the time they got in the truck. What happened in the truck, I couldn't see because I was driving. I looked back a couple of times. We had just gone three or four miles I believe and——

Q. Did any other cars pass you while you were in that vicinity?

(Testimony of Otto Berg.)

A. No. There was—it seems to me that there was a truck heading North as we neared camp after the accident.

(Witness excused.)

(HAROLD WILLIAM) JACK JOHNSTON,

being first duly sworn, testified as follows:

Q. Will you state your full name, please?

A. Harold William Johnston.

Q. You are a brother of Ray Johnston?

A. Yes.

Q. Where is your home?

A. Deep River, Iowa.

Q. Where are you temporarily residing?

A. At Big Delta.

Q. Were you acquainted with William Ernest Nutt?

A. Not until he came here to work.

Q. About how long ago was that?

A. I imagine about four weeks, or something like that.

Q. Did you see him last Friday, June 26th?

A. Yes.

Q. Where at?

A. I seen him at camp and then when we went to load the boat.

Q. Where at?

A. At Big Delta.

Q. What were you doing at Big Delta besides loading the barge?

A. I worked around there most of the afternoon

(Testimony of Harold William Johnston.)

and went across the river on the ferry and came home on a truck.

Q. Who was driving the truck?

A. Otto Berg.

Q. What time of the day did you leave for home?

A. I don't know exactly the time we did leave Big Delta. It was about 10:30 or 11 o'clock when the accident happened, but I had been out to Jimmy Brown's cabin.

Q. Where were you riding?

A. I was riding in the back end on the box.

Q. Who was with you?

A. Ernest Nutt and my brother, Ray.

Q. Who else was in the front with Otto Berg?

A. Jimmy Brown and Walter Welchell.

Q. You spoke of an accident—where did that happen?

A. I couldn't tell you exactly—about, I imagine, possibly 2½ or 3 miles, something like that. I'm all turned around in my directions.

Q. Towards camp from Big Delta? South on the highway?

A. That's right.

Q. Tell the jury the nature of the accident that happened.

A. I haven't got a whole lot to tell. I wasn't looking at the time he fell or jumped. The first thing I knew was when someone hollered and I turned. The first thing I seen he hit the ground and was rolling. But I didn't see him fall or didn't see him jump.

Q. What were you doing?

(Testimony of Harold William Johnston.)

A. I was sitting on the box in the front end and he was further back than I was.

Q. Where was your brother Ray?

A. He was behind me. I was clear in the front.

Q. Were you talking to Nutt?

A. Not at the time. I had been. I don't know just exactly the length of the time before but not very long.

Q. You fellows had been drinking quite a bit?

A. No. We had, I would venture to say, not over 3 or 4 bottles of beer.

Q. Did you have any whiskey?

A. One or two drinks.

Q. Did you feel the effects of your drinks?

A. Some. Not much. Not that I couldn't get around and couldn't walk straight.

Q. How about Nutt. Did he show any evidence of being too far?

A. Not more than anyone else. Just laughing and having a good time. So far as not being able to walk, he wasn't that way at all.

Q. Did you hear him say anything before he left the truck? A. No, I didn't.

Q. Did you feel sleepy at the time? A. No.

Q. Did you feel anything strike the car, or the car strike anything?

A. No. The road was so rough.

Q. What made the driver stop?

A. He said he noticed it, but being in the back and we weren't watching the road like the driver was.

(Testimony of Harold William Johnston.)

Q. How fast do you think you were going?

A. Not over 20 miles an hour I would say. 20 or 25 at the most.

Q. Was the road rough?

A. Not in that particular spot.

Q. Did the accident happen on a curve or a straight of way?

A. We were just around the curve. There is a little straight stretch, about 200 yards.

Q. When the car stopped what did you do?

A. I jumped out of the truck and by that time a couple of the others were back where he was lying and they told us to hurry on to camp and to get a doctor. I didn't get back to the body.

Q. Then you wouldn't know whether he was dead? A. I didn't know.

Q. You did not go down to examine the body?

A. No.

Q. You and who else went to camp?

A. There was Walter Welchell, Otto Berg and I, I believe. That was all.

Q. After you got to camp did you come back again? A. No.

Q. Did you hear—had Nutt been quarreling with anybody? A. Not to my knowledge.

Q. Did he seem to have any worries? Did he express any to you?

A. No. I had worked with him practically all the time since he had been to camp.

Q. What kind of work did he do?

A. He was just a laborer.

(Testimony of Harold William Johnston.)

Q. Where was his home?

A. Indianola, Iowa, I believe.

Q. How old a man would you say he was?

A. Well—about 50 years old if I heard him say.
I don't whether that was exact.

Q. Did he have a family?

A. Yes. I don't know how many children. He had some children. He told about some living in California and I heard him tell about losing his wife some time in January. I am not sure when.

Q. How tall a man was he?

A. Approximately 6 foot or 6 foot 1.

Question by Coroner: When you speak of the way you were sitting in the truck going out—you were sitting closest to the cab?

A. That's right.

Q. Ray was sitting next? A. That's right.

Q. Mr. Nutt was farther back in the truck than he. In other words he was two-thirds of the way back in the truck?

A. I imagine approximately.

Question by Jury: Didn't anybody see him jump out of the truck?

A. I don't know.

Q. He went out over the side?

A. I don't know. When I seen him rolling or bouncing, I would say he went over the side because he was almost to the very edge of the road not over a couple of feet from the ditch along the side of the road. I would imagine he went over the side. I didn't see it.

(Witness excused.)

JAMES F. BROWN,

being first duly sworn, testified as follows:

Q. What is your full name?

A. James F. Brown.

Q. Where is your home? A. Big Delta.

Q. That's where you are at the present?

A. That's where my home is.

Q. That is your regular home? A. Yes.

Q. Were you acquainted with William Ernest Nutt? A. Slightly. Not very well.

Q. Did you see him last Friday, June 26th?

A. Yes.

Q. Where did you see him?

A. I saw him at my place. I saw him last on the roadway.

Q. Where is your place? A. At Big Delta.

Q. You saw him on the roadway?

A. That's the last I saw him.

Q. How did you happen to be on the road? You were traveling in a truck?

A. Yes, we were in a truck.

Q. Where were you going?

A. To Jarvis Creek.

Q. Who all was in the truck?

A. There was six of us.

Q. Do you remember their names?

A. There was—well you know how it is—Walt and Jack and Ott and Ray and Ernie and myself. I believe there was six altogether. Three in the back and three in the front.

Q. Who was sitting in the back?

(Testimony of James F. Brown.)

A. Jack and Ray and Ernie.

Q. The two brothers and Ernie?

A. And Ernie.

Q. Where were they sitting in respect to the box?

A. That I don't recall.

Q. You were in front with Otto Berg and Walter?

A. And Walt.

Q. About what time did the accident happen?

A. I would say about 10:30 or 11 o'clock, but I am not sure of the time.

Q. When did you first know there had been an accident?

A. When we stopped the truck.

Q. How did the truck happen to stop?

A. Well, all I can recall was that—I remember a few minutes before the truck stopped I glanced back and saw Ernie standing up in the truck.

Q. You saw him standing?

A. Yes, I am pretty sure of that. Some of the fellows say he wasn't, but I am positive, and I turned my head back and got to talking and then the next thing I knew just before we stopped there was a sort of a bump or a jar and we stopped. Then Ray had jumped out of the truck. I am sure of that. I was out and was going back to where Ernie was lying on the ground. I said maybe his wind is knocked out so let's give him artificial respiration, so I held his head and was counting and then I looked and saw he was really dying, so I said "It's no use." We stopped and one of the boys got something out of the truck and put it over his face and I

(Testimony of James F. Brown.)

told the boys to go back to the camp and tell Mr. Cole and call the Marshal.

Q. You stayed with the body?

A. Johnston and myself. We built fires on both sides of the body.

Q. Any cars pass while you were there?

A. I think there was one. No, I am not quite sure. I think George Edgecombe passed. I sort of lost my head.

Q. Did you stay there until the Marshal came?

A. Yes, I was present when they came. Mr. Buckley and Mr. Growden.

Q. You mention a jolt—have you determined what caused the jolt?

A. No. I wouldn't venture to say whether it was a bump in the road or whether the car could have hit him—I don't know. I can't associate that jolt with anything.

Q. Did you hear them talking in back?

A. No, you couldn't hear. We were talking in front.

Q. Was there any evidence of foul play at all.

A. No. I wouldn't think so. We were all friends and I can't imagine anything like that. I should hesitate to say there was.

Q. The party had been drinking?

A. We all had a few drinks.

Q. Did Nutt appear intoxicated when he got into the truck? A. Yes, he was.

Q. In your opinion he appeared to be drunk?

A. At my place he was so much so that I asked

(Testimony of James F. Brown.)

him to lie down on the bed. He laid on the bed while we were talking and when we got ready to go he was all right.

Q. Were the Johnston boys very far gone?

A. No. To be perfectly frank I was the worst of all. I was pretty tight myself. That's one reason I'm inclined to be pretty vague.

Q. You are the one who suggested the artificial respiration? A. Yes.

(Witness excused.)

CERTIFICATE

I, Emma M. Cook, Fairbanks, Alaska, hereby certify:

That I was the Court Reporter in the Commissioner's Court for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska; that I attended the inquest entitled "In the Matter of the Inquest Upon the Body of William Ernest Nutt, Deceased," No. 176, at Fairbanks, Alaska, on June 29th, 1942, and took down in shorthand the testimony given and proceedings had thereat; that I thereafter transcribed the testimony of all witnesses, namely, Walter Welchell, Dr. A. J. Schaible, John J. Buckley, Ray Johnston, Otto Berg, Harold Johnston and James F. Brown, and the foregoing pages numbered 1 to 16, both inclusive, comprise a full,

true and correct statement and transcript of such testimony and proceedings.

Dated at Fairbanks, Alaska, this 23rd day of July, 1942.

EMMA M. COOK

Before the United States Employee's
Compensation Commission.

In the Matter of the Claim for Compensation
matter of the death of William Earnest Nutt.

INTERROGATORIES AND ANSWERS OF
A. A. LYON

Deposition of A. A. Lyon, taken at his office at 307 Masonic Temple Building, Des Moines, Polk County, Iowa, at 1:15 p. m. February 12, 1944.

Taken by S. S. Wright, Certified Shorthand Reporter and Notary Public, 417 Court House, Des Moines, Iowa.

Int. 1: What is your name and address and official position with your employer on June 26, 1942 and the period thereabouts?

A. A. A. Lyon. Engineer and superintendent of the Lytle-Green Construction Company.

Int. 2: What is the name and address of your employer who employed you in June, 1942?

A. Lytle-Green Construction Company. 307 Masonic Temple Building.

Int. 3: Were you personally acquainted with

(Deposition of A. A. Lyon.)

William Earnest Nutt who died on or about June 26, 1942?

A. Only as an employe.

Int. 4: Who was William Earnest Nutt's employers in June, 1942 at the time of his death, and what were his wages?

A. We were his employers. He was classed as a laborer at one dollar an hour. That was our labor schedule up there last year.

Int. 5: How long had he been in the employ of his employer prior to the time of his death?

A. I don't have a complete record of the total employment. The first day on the pay roll was June 1, 1942. The last day was June 26th, the day he died, that is the record we have here now.

Int. 6: State what work he was doing on the afternoon and evening of June 26th, 1942?

A. Miscellaneous common labor from 1:00 p.m. to 4:00 p.m., June 26, 1942, laid off for the day at 4:00 p.m.

Int. 7: What time of day did he complete his work?

A. 4:00 p.m. June 26th.

Int. 8: When he was working where was he working, and was he working on a boat?

A. He had been assisting six other men load a boat at Big Delta, Alaska, between 1:00 p.m. and 4:00 p.m.

Int. 9: If he was working on a boat, what was he doing?

A. He had been assisting six other men load a

(Deposition of A. A. Lyon.)

boat at Big Delta, Alaska, between 1:00 p.m. and 4:00 p.m.

Int. 10: Who was the foreman over William Earnest Nutt at that time? Please give his name and address and present location.

A. Bill Green, the foreman, took a crew of seven men to Big Delta to load a boat. The present address of Bill Green, the foreman, is not known.

Int. 11: Where was William Earnest Nutt staying in June, 1942, that is, where did he eat and sleep?

A. At the Company camp near the Big Delta Airport in Alaska.

Int. 12: Did his employer maintain the place where he ate and slept; and if so, how far was it from the place where he was working on the afternoon of June 26, 1942?

A. Yes, the point of loading the boat over thirteen miles north of the camp.

Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. On a Company truck to the place where they worked.

Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth be-

(Deposition of A. A. Lyon.)

tween these different places; and if so, where these different places were all in June, 1942?

A. Yes, all within the area of activity in connection with the construction of the Big Delta Airport.

Int. 15: Was the place where William Earnest Nutt stayed in June, 1942 a regular camp or barracks maintained by his employer for the use of his employer's employees?

A. Yes.

Int. 16: How far from the place where William Earnest Nutt was working on the day he was killed was the place he slept?

A. Twelve or thirteen miles.

Int. 17: Was there other transportation available to William Earnest Nutt to take him from his place of work to the place where the company maintained a camp for him to stay? This question relates to or about the time of William Earnest Nutt's death in June, 1942.

A. I don't know.

Int. 18: If other transportation was available, what was this transportation and how was it available?

A. Also unknown.

Int. 19: Did you as an employee of your employer, who was likewise William Earnest Nutt's employer, have any charge over him on the day he was killed in June, 1942?

A. No, I was not on the job.

Int. 20: Were you the foreman over him at the

(Deposition of A. A. Lyon.)

time he was working in the afternoon of June 26, 1942?

A. No.

Int. 21: What, if anything, did you tell him on the afternoon or evening of his death in reference to riding back to the Company's camp in a Company truck?

A. Nothing.

Int. 22: State if you know who the owner of the truck was in which truck William Earnest Nutt was riding at the time of his death.

A. A truck owned by the company.

Int. 23: State if you know who was the employer of the other men who were riding in the truck at the time William Earnest Nutt was killed.

A. Our Company.

Int. 24: When did you first learn of the death of William Earnest Nutt?

A. Late in the evening of the same day by telephone.

Int. 25: Was William Earnest Nutt's death generally known among the employees of his employer within the next day or so after his death?

A. I presume so.

Int. 26: When and how did you communicate the news of William Earnest Nutt's death to your superiors?

A. The matter was taken care of by those on the job.

Int. 27: Did you attend the coroner's inquest on

(Deposition of A. A. Lyon.)

the death of William Earnest Nutt before Honorable William N. Growden on June 29, 1942?

A. No.

Int. 28: State if you know who the insurance carrier for William Earnest Nutt's employer was carrying insurance against liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. State whether this insurance carrier was United States Fidelity and Guaranty Company.

A. I don't know.

Int. 29: State generally what if anything you know about the death of William Earnest Nutt, his employment at or shortly prior to his death including the afternoon before his death, and anything further which you deem of importance in reference to his employment or death which has not been asked you in prior interrogatories.

A. I don't know about that. I wasn't around there. All I have is hearsay.

Cross-Interrogatories

Int. 1: State in detail what the duties of the deceased, William Earnest Nutt, were as an employee of C. F. Lytle Company and Green Construction Company.

A. Miscellaneous laborer in connection with the airport construction in territory of Alaska.

Int. 2: What were his working hours and where was he assigned to work on the day on which he met his death?

A. Working hours ordinarily from 7:00 to 6:00,

(Deposition of A. A. Lyon.)

but on the day of his death I understand that due to weather conditions he worked only from 1:00 p.m. to 4:00 p.m. assisting in loading a boat on the river about twelve or thirteen miles north of the camp.

Int. 3: When had he completed his work on the day of his death?

A. 4:00 p.m.

Int. 4: At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. Their work was completed at 4:00 p.m.

Int. 5. State if you know on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt?

A. 4:00 p.m. of that day, and the other men with the exception of the deceased and two others, returned to their quarters.

Int. 6: When and how did the crew leave their place of work on this day?

A. I presume on the truck they used to go to the job.

Int. 7: Did the deceased leave with them on this day? A. Apparently not, I don't know.

Int. 8: If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A. I don't know.

Int. 9: Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose?

(Deposition of A. A. Lyon.)

A. According to reports, he didn't return on the truck provided.

Int. 10: If the answer to the above is "No," please state when the deceased did return or attempt to return from the vicinity where he was working.

A. According to our job report he left for camp about 10:30 p.m.

Int. 11: If he returned via truck, by whom and for what purpose was the truck on which he was riding being operated at the time of his death?

A. The truck reportedly was operated by Otto Berg, a Company employee, sent to Big Delta during the evening on Company business.

Int. 12: Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. For the purpose of the employer, I presume.

Int. 13: State if you know whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of C. F. Lytle Company and Green Construction Company.

A. According to our job reports, Otto Berg, the driver of the truck was the only man on Company business.

Int. 14: State if you know what the deceased had been doing immediately prior to getting on the truck from which he met his death.

A. Witnesses say that the deceased had been drinking just prior to getting on the truck.

(Deposition of A. A. Lyon.)

Int. 15: State, if you know, whether or not the deceased was intoxicated at the time of his death?

A. I don't know.

Int. 16: State if you know if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift.

A. Yes, occasionally, if in charge of a responsible driver.

CERTIFICATE

State of Iowa,
Polk County—ss.

I, S. S. Wright, a Certified Shorthand Reporter in and for the State of Iowa, and a Notary Public in and for Polk County, Iowa, hereby certify that on Saturday, February 12, 1944, at 1:15 p.m., at the office of A. A. Lyon, at 307 Masonic Temple Building, Des Moines, Polk County, Iowa, I took in shorthand the answers to the interrogatories and cross-interrogatories hereto attached, and I further certify that I have transcribed said answers into longhand as above set out, and hereby certify that the foregoing transcript is a full, true and complete transcript of said interrogatories and answers as the same were taken by me in shorthand, and that the said transcript above set out contains all the pro-

ceedings had at said time and place. Witness my hand this 19th day of February, 1944.

(Seal) S. S. WRIGHT,
Notary Public in and for Polk County, Iowa.

[Printer's Note: Attached hereto are the interrogatories and cross-interrogatories which are duplicated in the foregoing deposition.]

Before the United States Employees' Compensation
Commission

In the Matter of the Claim for Compensation in the
death of William Earnest Nutt.

INTERROGATORIES PROPOUNDED TO AND ANSWERS OF WILLIAM H. GREEN

Deposition of William H. Green, Sioux City, Iowa, taken at Sioux City, Woodbury County, Iowa, on Wednesday, March 1, 1944, in answer to written interrogatories, before Jarvis Campbell, Notary Public in and for Woodbury County, Iowa, and also a Certified Shorthand Reporter, 301 Court House, Sioux City, Iowa.

William H. Green, of Sioux City, Iowa, being first duly sworn, testified as follows in answer to the written interrogatories propounded to him as hereinafter set out, at Sioux City, Iowa, on Wednesday, March 1, 1944:

(Deposition of William H. Green.)

Direct Interrogatories

Int. 1: What is your name and address and official position with your employer, on June 26, 1942 and the period thereabouts?

A. My name is William H. Green and I live at 1010 Twenty-eighth Street, Sioux City, Iowa. I was foreman for C. F. Lytle Company and Green Construction Company, and had charge of electrical wiring.

Int. 2: What is the name and address of your employer who employed you in June, 1942?

A. C. F. Lytle Company and Green Construction Company, Des Moines, Iowa.

Int. 3: Were you personally acquainted with William Earnest Nutt who died on or about June 26, 1942?

A. No, I was not personally acquainted with him. I knew who he was and knew he was working on this job.

Int. 4: Who was William Earnest Nutt's employers in June, 1942 at the time of his death, and what were his wages?

A. He was employed on the Big Delta air base job by C. F. Lytle Company and Green Construction Company, I do not know what his wages were.

Int. 5: How long had he been in the employ of his employer prior to the time of his death?

A. I don't know.

Int. 6: State what work he was doing on the afternoon and evening of June 26th, 1942?

A. Well, that afternoon we were loading ma-

(Deposition of William H. Green.)

terial on a small boat to be shipped up the river and he was a member of the crew engaged in this work.

Int. 7: What time of day did he complete his work?

A. I would say it was late in the afternoon. I cannot give a more definite time as I cannot remember.

Int. 8: When he was working where was he working, and was he working on a boat?

A. He was working at loading material on a boat. The place where he was working would be at the Big Delta River bank.

Int. 9: If he was working on a boat, what was he doing?

A. Well, he was loading material on the boat along with the other men.

Int. 10: Who was the foreman over William Earnest Nutt at that time? Please give his name and address and present location.

A. I was the foreman over him on that particular day. My present address is 1010 Twenty-eighth Street, Sioux City, Iowa, and I am presently located and working in Sioux City, Iowa.

Int. 11: Where was William Earnest Nutt staying in June, 1942. that is, where did he eat and sleep?

A. Well, Lytle and Green had barracks at this Big Delta air base and he was eating and sleeping there.

Int. 12: Did his employer maintain the place where he ate and slept; and if so, how far was it

(Deposition of William H. Green.)

from the place where he was working on the afternoon of June 26, 1942?

A. His employer did maintain the place where he ate and slept. This was about 10 miles from the place where he was working on the afternoon of June 26, 1942; however, I am not certain as to the exact distance.

Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. The company had trucks that were used to carry material on the construction job and the workers would ride to and from work on these trucks.

Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?

A. The company did provide a place for him to work and a place for him to stay and for him to eat and provided transportation on their trucks back and forth between the different places where the men would be working. In June 1942 we were working at the Big Delta air base and he was staying at Big Delta air base; we had barracks right there and a cook and mess hall.

Int. 15: Was the place where William Earnest Nutt stayed in June, 1942 a regular camp or bar-

(Deposition of William H. Green.)

racks maintained by his employer for the use of his employer's employees?

A. Yes, that is right, it was a regular place for the use of the employees.

Int. 16: How far from the place where William Earnest Nutt was working on the day he was killed was the place he slept?

A. I would say it was about 10 miles but I don't know exactly.

Int. 17: Was there other transportation available to William Earnest Nutt to take him from his place of work to the place where the company maintained a camp for him to stay? This question relates to or about the time of William Earnest Nutt's death in June, 1942.

A. There was no other transportation that I know of except the trucks going up and down the highway.

Int. 18: If other transportation was available, what was this transportation and how was it available?

A. The transportation available would be the Lytle and Green trucks going up and down the highway. they were hauling these supplies up and down the highway. You see, their trucks were going up and down the highway all the time, day and night, back and forth from clear down from Veldeze to Fairbanks.

Int. 19: Did you as an employee of your employer, who was likewise William Earnest Nutt's

(Deposition of William H. Green.)

employer, have any charge over him on the day he was killed in June, 1942?

A. He was working on the crew that afternoon that I was in charge of as foreman.

Int. 20: Were you the foreman over him at the time he was working in the afternoon of June 26, 1942? A. Yes.

Int. 21: What, if anything, did you tell him on the afternoon or evening of his death in reference to riding back to the Company's camp in a Company truck?

A. I did not tell him anything in reference to riding back to the company's camp in a company truck.

Int. 22: State if you know who the owner of the truck was in which truck William Earnest Nutt was riding at the time of his death.

A. I do not know.

Int. 23: State if you know who was the employer of the other men who were riding in the truck at the time William Earnest Nutt was killed.

A. I do not know. I don't know anything about who was riding in the truck at the time he was killed.

Int. 24: When did you first learn of the death of William Earnest Nutt?

A. Well, I heard about that later on that same evening after supper.

Int. 25: Was William Earnest Nutt's death generally known among the employees of his employer within the next day or so after his death?

A. Yes, they all knew about it the next day.

(Deposition of William H. Green.)

Int. 26: When and how did you communicate the news of William Earnest Nutt's death to your superiors?

A. I did not communicate the news of his death to my superiors.

Int. 27: Did you attend the coroner's inquest on the death of William Earnest Nutt before Honorable William N. Growden on June 29, 1942?

A. No, I did not.

Int. 28: State if you know who the insurance carrier for William Earnest Nutt's employer was carrying insurance against liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. State whether this insurance carrier was United States Fidelity and Guaranty Company.

A. I don't know a thing about who their insurance was with.

Int. 29: State generally what if anything you know about the death of William Earnest Nutt, his employment at or shortly prior to his death including the afternoon before his death, and anything further which you deem of importance in reference to his employment or death which has not been asked you in prior interrogatories.

A. I don't know anything about the death of Nutt. I don't know anything about his work except that on this particular day he was one of the men sent up there to load this boat and I was in charge of the crew. There is nothing further that I have to add.

(Deposition of William H. Green.)

Cross-Interrogatories

Int. 1: State in detail what the duties of the deceased, William Earnest Nutt, were as an employee of C. F. Lytle Company and Green Construction Company.

A. I don't know what his duties were except that on this particular day he was working on the crew that I was in charge of; he was not regularly working under me and I don't know what his duties were; he was just assigned to the crew on this day to load this boat with material; we were loading electrical material and he was sent up to help load the boat; the company ordered me to see that this electrical material got on its way and sent this crew to do the loading.

Int. 2: What were his working hours and where was he assigned to work on the day on which he met his death?

A. I don't know what his working hours were. He was assigned up to this Big Delta River bank to load this boat.

Int. 3: When had he completed his work on the day of his death?

A. Well, it was late that afternoon when he completed his work; I do not know the exact time.

Int. 4: At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. On this particular day this crew of men had been assigned to load the boat and finish the job, which was completed late that afternoon. This was

(Deposition of William H. Green.)

not a crew that I regularly had charge of and I do not know their hours, except that we were to finish loading this boat before quitting for the day.

Int. 5: State, if you know, on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt.

A. We finished late that afternoon but I do not remember the exact time we finished.

Int. 6: When and how did the crew leave their place of work on this day?

A. The crew left in the company trucks after finishing the work, but I cannot remember what time it was except that it was late in the afternoon.

Int. 7: Did the deceased leave with them on this day?

A. He did not leave on the truck that I was riding on and I do not personally know how he went back to camp.

Int. 8: If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A. I do not know.

Int. 9: Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose?

A. I do not know.

Int. 10: If the answer to the above is "no", please state when the deceased did return or attempt to return from the vicinity where he was working.

A. I do not know.

Int. 11: If he returned via truck, by whom and

(Deposition of William H. Green.)

for what purpose was the truck on which he was riding being operated at the time of his death?

A. I do not know, I can't answer this question.

Int. 12: Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. I do not know.

Int. 13: State, if you know, whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of C. F. Lytle Company and Green Construction Company.

A. I do not know.

Int. 14: State, if you know, what the deceased had been doing immediately prior to getting on the truck from which he met his death.

A. I do not know.

Int. 15: State, if you know, whether or not the deceased was intoxicated at the time of his death.

A. I do not know.

Int. 16: State, if you know, if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift.

A. They provided transportation at all times in the company trucks; the men would ride in the company trucks back and forth at all times.

WILLIAM H. GREEN

Subscribed in my presence and sworn to before me this 7th day of March, 1944.

(Seal) JARVIS CAMPBELL,

Notary Public in and for Woodbury County, Iowa.

My commission expires July 4, 1945.

CERTIFICATE

State of Iowa,
Woodbury County—ss.

I, Jarvis Campbell, Notary Public in and for Woodbury County, Iowa, and also a Certified Shorthand Reporter in and for the State of Iowa, hereby certify that on Wednesday, March 1, 1944, at Sioux City, Woodbury County, Iowa, William H. Green, of Sioux City, Iowa, appeared before me for the purpose of answering the above and foregoing written interrogatories; that before giving his answers as above set forth he was by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that said written interrogatories were propounded to the said William H. Green by me and that I took down in shorthand his answers thereto; that I have transcribed said answers into typewriting as above set out, and that the above and foregoing answers as herein set out are the answers given by the said William H. Green at the said time; that on March 7, 1944, the said William H. Green, after reading the said written interrogatories and his answers given thereto, subscribed his name at the end thereof as set out and shown on page 11 hereof.

Witness my hand this 7th day of March, 1944.

(Seal) JARVIS CAMPBELL,
Notary Public in and for Woodbury County, Iowa.

My commission expires July 4, 1945.

Before the United States Employee's Compensation
Commission

In the Matter of the Claim for Compensation in
the Death of William Earnest Nutt.

INTERROGATORIES AND ANSWERS OF
RALPH GREEN

Deposition of Mr. Ralph Green, taken at his office at 317 Masonic Temple Building, Des Moines, Polk County, Iowa, at 10 a. m. on Saturday, February 12, 1944.

Taken by S. S. Wright, Certified Shorthand Reporter and Notary Public, 417 Court House, Des Moines, Iowa.

Int. 1. What is your name and address and official position with your employer, on June 26, 1942 and the period thereabouts?

A. Ralph Green. I own the Green Construction Company and act as attorney in fact for the C. F. Lytle Company, acting as general manager for the co-partnership.

Int. 2. What is the name and address of your employer who employed you in June, 1942?

A. Well, I am self-employed.

Int. 3. Were you personally acquainted with William Earnest Nutt who died on or about June 26, 1942? A. No, I was not.

Int. 4. Who was William Earnest Nutt's employer in June, 1942, at the time of his death and what were his wages?

A. Well, it would be C. F. Lytle Company and

(Deposition of Ralph Green.)

Greene Construction Company were the employers. I cannot tell you what his wage was. I really don't know. Whatever his wage classification was is what it would be. I think Mr. Lyons can give you that information, I am quite sure.

Int. 5. How long had he been in the employ of his employer prior to the time of his death?

A. I cannot answer that.

Int. 6. State what work he was doing on the afternoon and evening of June 26, 1942?

A. I cannot tell you that.

Int. 7. What time of day did he complete his work?

A. That is beyond me too, I do not know the circumstances regarding it at all.

Int. 8. When he was working where was he working, and was he working on a boat?

A. Well, I don't know, he was working on a job at Big Delta which was the airport in Alaska. I don't know what his particular duties might have been at that time.

Int. 9. If he was working on a boat, what was he doing? A. I wouldn't know.

Int. 10. Who was the foreman over William Earnest Nutt at that time? Please give his name and address and present location.

A. Al Lyons was the general superintendent. I don't know who his particular foreman might have been.

Int. 11. Where was William Earnest Nutt stay-

(Deposition of Ralph Green.)

ing in June, 1942 that is, where did he eat and sleep?

A. Well, I assume that he stayed with the rest of the men at the camp at the job.

Int. 12. Did his employer maintain the place where he ate and slept, and if so, how far was it from the place where he was working on the afternoon of June 26, 1942?

A. Well, we maintain the place that they do eat and sleep, but I don't know where he might have been working on that particular day. The living and eating quarters was at the side of the work on the main job. He might have been on some special assignment, I don't know about that.

Int. 13. What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. I cannot tell you that, I don't know what arrangements they had.

Int. 14. State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?

A. Generally speaking, his work was at the location of the camp, and there was transportation necessary other than the ability to walk to the

(Deposition of Ralph Green.)

work. I don't know what this particular case might have been.

Int. 15. Was the place where William Earnest Nutt stayed in June, 1942, a regular camp or barracks maintained by his employer for the use of his employer's employees? A. That is right.

Int. 16. How far from the place where William Earnest Nutt was working on the day he was killed was the place where he slept?

A. I could not tell you that, I don't know what his particular duties were on that particular day.

Int. 17. Was there other transportation available to William Earnest Nutt to take him from his place of work to the place where the company maintained a camp for him to stay? This question relates to or about the time of William Earnest Nutt's death in June, 1942.

A. I cannot answer that.

Int. 18. If other transportation was available, what was this transportation, and how was it available? A. I cannot answer that.

Int. 19. Did you, as an employee of your employer, who was likewise William Earnest Nutt's employer, have any charge over him on the day he was killed in June, 1942?

A. I don't know what the arrangements might have been on that particular day.

Int. 20. Were you the foreman over him at the time he was working in the afternoon of June 26, 1942? A. No.

Int. 21. What, if anything, did you tell him

(Deposition of Ralph Green.)

on the afternoon or evening of his death in reference to riding back to the company's camp in a company truck?

A. I told him nothing, I was not at the job site at all.

Int. 22. State if you know who the owner of the truck was in which truck William Earnest Nutt was riding at the time of his death.

A. I understood it was our truck, but I am not positive about that even.

Int. 23. State if you know who was the employer of the other men who were riding in the truck at the time William Earnest Nutt was killed?

A. I don't know who the other men were.

Int. 24. When did you first learn of the death of William Earnest Nutt?

A. I cannot answer on that positively, and I am not sure what date they informed me of.

Int. 25. Was William Earnest Nutt's death generally known among the employees of his employer within the next day or so after his death?

A. I think it was known immediately.

Int. 26. When and how did you communicate the news of William Earnest Nutt's death to your superiors?

A. Well, I have no superiors. I think Mr. Lyons informed me of his death.

Int. 27. Did you attend the coroner's inquest on the death of William Earnest Nutt before Honorable William N. Growden on June 27, 1942?

A. No.

(Deposition of Ralph Green.)

Int. 28. State, if you know, who the insurance carrier for William Earnest Nutt's employer was carrying insurance against liability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. State whether this insurance carried was United States Fidelity and Guaranty Company.

A. Yes, I am sure it was the United States Fidelity and Guaranty Company.

Int. 29. State generally what, if anything, you know about the death of William Earnest Nutt, his employment at or shortly prior to his death including the afternoon before his death, and anything further which you deem of importance in reference to his employment or death which has not been asked you in prior interrogatories?

A. I do not know that I can add anything to that, I am not familiar enough with the case to know the particulars.

Cross-Interrogatories

Int. 1. State in detail what the duties of the deceased, William Earnest Nutt were as an employee of the C. F. Lytle Company and Green Construction Company.

A. I was not present on this job at the time of this man's death and I am not familiar enough with it to know the details.

Int. 2. What were his working hours and where

(Deposition of Ralph Green.)

was he assigned to work on the day on which he met his death? A. I don't know.

Int. 3. When had he completed his work on the day of his death?

A. I cannot answer that.

Int. 4. At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. I cannot answer that.

Int. 5. State, if you know, on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt?

A. I don't know that.

Int. 6. When and how did the crew leave their place of work on this day?

A. I cannot answer that.

Int. 7. Did the deceased leave with them on this day? A. I don't know.

Int. 8. If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A. I don't know.

Int. 9. Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose?

A. I don't know.

Int. 10. If the answer to the above is "No," please state when the deceased did return or attempt to return from the vicinity where he was working? A. I don't know that.

(Deposition of Ralph Green.)

Int. 11. If he returned via truck, by whom and for what purpose was the truck on which he was riding being operated at the time of his death?

A. I don't know that.

Int. 12. Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. I cannot answer that.

Int. 13. State, if you know, whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of C. F. Lytle Company and Green Construction Company.

A. I don't know that.

Int. 14. State, if you know, what the deceased had been doing immediately prior to getting on the truck from which he met his death?

A. I don't know that.

Int. 15. State, if you know, whether or not the deceased was intoxicated at the time of his death?

A. I don't know that.

Int. 16. State, if you know, if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift?

A. I don't know what the particular arrangements were on this job.

CERTIFICATE

State of Iowa,
Polk County—ss.

I, S. S. Wright, a Certified Shorthand Reporter in and for the State of Iowa, and a Notary Public in and for Polk County, Iowa, hereby certify that on Saturday, February 12, 1944, at 10 a. m. at the office of Ralph Green, at 317 Masonic Temple Building, Des Moines, Polk County, Iowa, I took in shorthand the answers to the interrogatories and cross-interrogatories hereto attached, and I further certify that I have transcribed said answers into long-hand as above set out, and hereby certify that the foregoing transcript is a full, true and complete transcript of said interrogatories and answers as the same were taken by me in shorthand, and that the said transcript above set out contains all the proceedings had at said time and place. Witness my hand this 19th day of February, 1944.

[Seal] S. S. WRIGHT,
Notary Public in and for Polk County, Iowa.

Before the United States Employees' Compensation
Commission

In the Matter of the Claim for Compensation in
the Death of William Earnest Nutt.

INTERROGATORIES TO BE PROPOUNDED
TO ROBERT L. NINE

Mr. Robert L. Nine, being called as a witness on behalf of the heirs of William Earnest Nutt, de-

(Deposition of Robert L. Nine.)

ceased, and Clark Nutt, and after being first duly sworn before the officer hereinafter named and described as authorized by law to administer oath, makes the following answers to the interrogatories and cross-interrogatories hereinafter set out.

Int. 1. What is your name, age and present address and residence?

A. Robert L. Nine, 32 years, Box 1130, Fairbanks, Alaska, residing at Big Delta, Alaska.

Int. 2. Who is your president employer and who employed you in June, 1942?

A. Lytle & Green Construction Co. now and in June, 1942.

Int. 3. Were you personally acquainted with William Earnest Nutt who died on or about June 26, 1942? A. Yes.

Int. 4. How long had you known William Earnest Nutt, and were you in any way related to him or his family?

A. About 15 years. I was not related to him or his family.

Int. 5. State, if you know, who employed William Earnest Nutt in June, 1942 and who his employers were on June 25th and 26th, 1942.

A. Lytle & Green Construction Co.—to both parts of question.

Int. 6. Were you working with William Earnest Nutt on the afternoon of June 26, 1942 or on the date he was killed. A. Yes.

Int. 7. If so, was he employed with you on the

(Deposition of Robert L. Nine.)

same job and by the same employer, and if so, who was that employer? A. Yes. Same employer.

Int. 8. What job were you working on, on the afternoon of the day he was killed, and where was this work being carried on and who was all working there with William Earnest Nutt?

A. We were loading electrical equipment on a barge on the Tanana River at Big Delta. Ray Johnson, and Jack Johnson, and Foreman Bill Green. There were three others but I do not remember their names.

Int. 9. State, if you know, who the foreman over William Earnest Nutt and yourself was on the afternoon before William Earnest Nutt was killed.

A. William B. Green.

Int. 10. What work was your employer doing in June, 1942, that you and William Earnest Nutt were working on?

A. Building airport at Big Delta, Alaska; we were working on paving, but on this day, loading electrical equipment on barge.

Int. 11. Did the company maintain a camp for its employees including William Earnest Nutt, and if so, where was that camp in reference to the place where you were working on the afternoon of the day William Earnest Nutt was killed?

A. Yes. It was about eleven (11) miles from where we were working on the day Wm. E. Nutt was killed.

Int. 12. Did the company maintain this camp

(Deposition of Robert L. Nine.)

for its employees, including William Earnest Nutt?
State if you know. A. Yes.

Int. 13. Did the employees sleep there and did they eat there? A. Yes.

Int. 14. Did the company furnish transportation from the camp to the place where its work was being done by you and William Earnest Nutt and the other employees, and if so, what type of transportation and what method of transportation was furnished by company? A. Yes, by truck.

Int. 15. On the day William Earnest Nutt was killed, did you go to the place of work where he was working with him, and if so, about what time of day did you go and what method of transportation did you use?

A. Yes, I went with him. We left the camp at 1:00 P. M. by truck.

Int. 16. Did one of your employer's trucks transport you from the camp to the place where that work was done that William Earnest Nutt and you and the others were doing on the afternoon of the day he was killed? A. Yes.

Int. 17. What kind of a day was it in reference to weather and what kind of a road was there between the camp and the place where you and William Earnest Nutt and the others were working?

A. Rainy day nad the road was rough.

Int. 18. What were you and William Earnest Nutt and the others with you working at for your employer on the afternoon of the day William Earnest Nutt was killed?

(Deposition of Robert L. Nine.)

A. We were loading electrical equipment on a barge.

Int. 19. How long did you and William Earnest Nutt work that afternoon or that day?

A. That afternoon we worked about five (5) hours.

Int. 20. What did you and William Earnest Nutt and the others do after your work was completed, and where did you go?

A. It was raining and we got wet so we went to Rika Wallen's roadhouse to dry out.

Int. 21. If you went to Rika's roadhouse, where was that in referenec to the place where you and William Earnest Nutt were working, and did William Earnest Nutt also go to the same place.

A. Rika's roadhouse was about 500 feet from where we were working. Mr. Nutt also went there.

Int. 22. About what time of day did you go to that place? A. About 6:00 P. M.

Int. 23. State, if you know, whether or not the foreman over William Earnest Nutt and yourself, Mr. W. B. Green, was an employee of the same employer employing you and William Earnest Nutt on that afternoon, and also state, if you know, what the name of that employer was.

A. Yes, employer of all was Lytle & Green Const. Co.

Int. 24. State, if you know, whether William Earnest Nutt was instructed by W. B. Green as to how he was to return to the camp, and state whether there was any conversation in your pres-

(Deposition of Robert L. Nine.)

ence in reference to returning to the camp between W. B. Green and William Earnest Nutt or any others, and state what that conversation was.

A. Yes. There were two trucks and Mr. Green told the ones that wanted to go on the first truck to do so, or take the second truck later. I did not hear any direct conversation between Mr. Green & Mr. Nutt. Mr. Green addressed the group of employees as a whole and left it up to us as to which truck to take back to camp.

Int. 25. Did you remain at the roadhouse, or did you return with the first truck, and if you did return with the first truck, about what time did you return to the camp?

A. I returned with first truck. Returned to camp about 7:00 P. M.

Int. 26. State if you know, whether the roadhouse sold hard liquor, and state what, if anything, you know about what beverages were available to people in the roadhouse.

A. The roadhouse sold no hard liquor, but beer was available.

Int. 27. State, if you know, whether William Earnest Nutt was drinking on the evening of the day he was killed, and if so, state, if you know, what he was drinking.

A. To my knowledge Mr. Nutt was not drinking, at least while I was there.

Int. 28. State, if you know, whether William Earnest Nutt was riding in a truck belonging to

(Deposition of Robert L. Nine.)

your employer and his employer at the time he was killed.

A. William Earnest Nutt was riding in a truck belonging to my employer and his at the time he was killed.

Int. 29. State, if you know, who was riding in the same truck at the time William Earnest Nutt was killed.

A. Jack Johnson, Ray Johnson, Otto Berg and another boy by the name of Walter something, do not recall his last name.

Int. 30. State, if you know, where William Earnest Nutt was killed and state, if you know, where in reference to the camp the spot was that William Earnest Nutt was killed.

A. Yes, I know Mr. Nutt was killed about five miles between Big Delta and the camp site.

Int. 31. Did you see the spot where William Earnest Nutt was killed shortly after he was killed, and if so, how soon after and when?

A. I saw the spot about five hours after Mr. Nutt was killed.

Int. 32. Describe, if you can, the truck William Earnest Nutt was riding in at the time he was killed.

A. It was 1937 V8 with a yard and a half dump box on it.

Int. 33. Tell who the owner of the truck was that William Earnest Nutt was riding in at the time he was killed, and tell who the employer was

(Deposition of Robert L. Nine.)

of the other persons riding in the truck with William Earnest Nutt.

A. Lytle & Green Const. Co. was the owner of the truck and also the employer of the other persons riding in the truck with Wm. E. Nutt.

Int. 34. State, if you know, whether the spot where William Earnest Nutt was killed was on a straight-a-way or on a curve or near a curve, and which direction from the curve that spot was in reference to the curve, and approximately how far said spot was from the roadhouse.

A. It was just coming out of a curve approximately five miles from the roadhouse and 500 feet from the curve to where he was killed, approximately.

Int. 35. State, if you can, whether the road at the point where the accident occurred was rough or smooth or rutty, or what the condition of the road was, and whether the road was wet or dry at the time.

A. Road was wet and rutty at the time of the accident.

Int. 36. Are you acquainted with the family of William Earnest Nutt, and if so, how long have you been acquainted with the family of William Earnest Nutt?

A. Yes, about 15 years.

Int. 37. Are you acquainted with Phyliss Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, and state, if you know, whether they are the minor children of William Earnest Nutt?

(Deposition of Robert L. Nine.)

A. Yes, they are the minor children of Wm. Earnest Nutt and I am acquainted with them.

Int. 38. State, if you know, whether the approximate ages of the children are as follows: Phyllis Elaine Nutt, 13; Kenneth James Nutt, 15; and Raymond Albert Nutt, 17. A. Yes.

Int. 39. Are you personally acquainted with Clark Nutt. A. Yes.

Int. 40. What is his name and address and his relationship to William Earnest Nutt?

A. His name is Clark Nutt, Indianola, Iowa, and he is a brother of William Earnest Nutt.

Int. 41. Have you examined the court records in Warren County, Iowa, in reference to the appointment of Clark Nutt as guardian for Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, and if so, state whether or not those court records disclosed that he has been appointed guardian for those minor children of William Earnest Nutt?

A. Yes, I have examined the court records in Warren County, Iowa, and Clark Nutt has been appointed guardian of the above named minor children of Wm. E. Nutt.

Int. 42. Are you in any way related to Clark Nutt or his wife, or members of his family?

A. No.

Int. 43. How long have you known Clark Nutt?

A. About 15 years, more or less.

Int. 44. After the death of William Earnest Nutt, did you do anything in reference to arrang-

(Deposition of Robert L. Nine.)

ing for the transportation of his body back to Indianola, Iowa, and if so, with whom did you communicate?

A. Yes, I communicated with Clark Nutt and arranged for the transportation of the body to Indianola, Iowa.

Int. 45. State, if you know, whether Clark Nutt paid any or all of the transportation and embalming expenses and funeral expenses of William Earnest Nutt, and state how you know what you do know.

A. Clark Nutt paid all transportation, embalming and funeral expenses of William Earnest Nutt and I know that because Clark Nutt wired money covering all these expenses to local Tye funeral Home at my request.

Int. 46. State, if you can, the approximate amount paid by Clark Nutt for transportation of the body and embalming and funeral expenses of William Earnest Nutt.

A. I believe it was approximately \$750.00.

Int. 47. State, if you know, whether there was a coroner's hearing over the death of William Earnest Nutt, and if so, state whether any of your employers' employees were present at that hearing.

A. Yes, there was a coroner's hearing, and there were several of my employer's employees present at that hearing.

Int. 48. State when and where that hearing occurred and what the nature of the hearing was.

A. The hearing occurred at Fairbanks, Alaska,

(Deposition of Robert L. Nine.)

before U. S. Commissioner Wm. N. Growden, about July 1st, 1942.

Int. 49. State whether or not the fact of William Earnest Nutt's death and the circumstances thereof were common knowledge among the employees of your employer and William Earnest Nutt's employer shortly after his death.

A. Yes, the death and circumstances were common knowledge among employees.

Int. 50. Name some of the employees, if you can, of your employer and William Earnest Nutt's employer whom you heard discuss this matter and about the date that you heard that discussion.

A. Al Lyons and Ralph Green, about June 27th, 1942.

Int. 51. Did you discuss the death of William Earnest Nutt with any of the employees or officers or foreman of your employer and William Earnest Nutt's employer shortly after the death of William Earnest Nutt, and if so, that with whom you discussed it and when you discussed it.

A. Yes, I discussed the death the next morning with Ralph Green and Al Lyons.

Int. 52. If you did discuss it with any of the employees, state whether any of them told you that it had been reported to your employer and William Earnest Nutt's employer, and if so, when and where this conversation occurred.

A. Al Lyons, general superintendent, told me that the death had been reported. Conversation occurred in the office at camp, June 27th, 1942.

(Deposition of Robert L. Nine.)

Int. 53. Are you in any manner interested financially, or otherwise in a claim in connection with the death of William Earnest Nutt, and specifically in connection with the claim filed in this court over the death of William Earnest Nutt? A. No.

Int. 54. State, if you know, whether there was any other method of transportation back from the place of work to the camp available to the employees of your employer and William Earnest Nutt's employer on the date that William Earnest Nutt's death occurred, and if so, state what that transportation was.

A. No other transportation to the camp that I know of.

Int. 55. State, if you know, what William Earnest Nutt was making at the time, or about the time, he was killed. In your answer state how he was paid and whether his pay that you are testifying about was solely pay from his employer and what the name of that employer was. State how you know what his pay was and what the rate of pay was.

A. Wm. E. Nutt was making about \$100.00 per week, paid by check by Lytle & Green Construction Co. Rate of pay was \$1.00 per hour.

Int. 56. State, if you know, who the insurance carrier was for liability, in connection with this matter, for your employer.

A. United States Fidelity and Guaranty Company, was insurance carrier for employer.

Int. 57. State anything further which you know in reference to the circumstances of William Earn-

(Deposition of Robert L. Nine.)

est Nutt's employment his wages, the work which he was doing on the date he was killed, the employment conditions, the place where the camp was located, the road, and any other matters which occur to you that are pertinent to the claim before the commissioner.

A. The truck on which Mr. Nutt was riding at the time of the accident was a dump truck with the sides of the box about 12 inches high. It is my opinion that as the truck rounded the curve, it hit a chuck hole and Mr. Nutt was knocked to the ground.

Cross-Interrogatories

Submitted by United States Fidelity and Guaranty Co. and C. E. Lytle Company and Green Construction Co.

Int. 1. State in detail what the duties of the deceased, William Earnest Nutt were as an employee of the C. F. Lytle Company and Green Construction Company.

A. Employed as a laborer for the Company

Int. 2. What were his working hours and where was he assigned to work on the day on which he met his death?

A. His working hours were from ten to fifteen hours per day. On the day of his death he was assigned to work at Big Delta, on the Tannana River on loading a barge.

Int. 3. When had he completed his work on the day of his death?

A. Around six o'clock in the evening.

(Deposition of Robert L. Nine.)

Int. 4. At what time did the crew with which he was working on the day of his death ordinarily complete their work and return to their quarters?

A. They worked until their job was completed.

Int. 5. State, if you know, on what time the crew completed their work at the place they were assigned on the day of the death of William Earnest Nutt?

A. Approximately six o'clock.

Int. 6. When and how did the crew leave their place of work on this day?

A. Part of the crew left at once as it was raining. The balance of crew went to Reka's Road House to dry their clothes. Both crews left by truck.

Int. 7. Did the deceased leave with them on this day? A. Yes, in the second truck.

Int. 8. If the answer to the above is in the negative, what did the deceased do after the rest of the crew left the place where they were working?

A.

Int. 9. Did the deceased return from the place where he was working on the day of his death on a truck provided for this purpose? A. Yes.

Int. 10. If the answer to the above is "no" please state when the deceased did return or attempt to return from the vicinity where he was working? A.

Int. 11. If he returned via truck, by whom and for what purpose was the truck on which he was riding being operated at the time of his death?

(Deposition of Robert L. Nine.)

A. The truck was operated by Otto Berg. A company truck and Berg, as mechanic for the company, was trying it out, so the balance of crew rode home with him.

Int. 12. Was it being operated for the purpose of the employer or for the purpose of the persons driving or in charge of the truck?

A. For the purpose of the employer.

Int. 13. State, if you know, whether the other men in the truck with the deceased at the time of his death, were working or had been working or were on the business of the C. F. Lytle Company and Green Construction Company.

A. Yes, with the exception of one Jim Brown, who lived on the road two miles from Big Delta and nine miles from the airport. This man caught a ride home as the road lead past his door.

Int. 14. State, if you know, what the deceased had been doing immediately prior to getting on the truck from which he met his death?

A. I do not know.

Int. 15. State, if you know, whether or not the deceased was intoxicated at the time of his death?

A. In my opinion, no.

Int. 16. State, if you know, if C. F. Lytle and Green Construction Company provided transportation for their workmen at their place of work at times other than the regular shift? A. Yes.

(Deposition of Robert L. Nine.)

State of Iowa

Warren County—ss.

Robert Nine, being first duly sworn on oath, deposes and says that he has subscribed the answers to the foregoing interrogatories and that being first duly sworn on oath deposes and says that the answers made and subscribed thereto are true.

ROBERT L. NINE

Subscribed and sworn to before me this 25th day of Oct., 1944.

LILLIAN WALKER

Clerk, District Court in and for Warren County,
Iowa.

United States Employees' Compensation Commission,
Fourteenth Compensation District

In the Matter of the Claim for Compensation Under
Public Law 208, 77th Congress, Act of August
6, 1941, as Amended.

Case No. DB-14-655-11

CLARK NUTT, as legally appointed guardian of
PHYLLIS ELAINE NUTT, KENNETH
JAMES NUTT, and RAYMOND ALBERT
NUTT, children of WILLIAM EARNEST
NUTT, deceased employee,

Claimant,

vs.

C. F. LYTLE CO. and GREEN CONSTRUCTION
COMPANY,

Employer,

U. S. FIDELITY & GUARANTY COMPANY,
Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 26th day of June, 1942, the claimant above named was in the employ of the employer above named at Big Delta, Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Act of August 16, 1941, as amended (42 U.S.C. sec. 1651), to employees of contractors with the United States, and others, employed outside the United States; that the liability of the employer for compensation under said Act was insured by U. S. Fidelity & Guaranty Company;

That on June 26, 1942 and previous thereto because of the location of the work the said employer provided barracks for its employees to live in and truck transportation to and from job locations that were not within walking distance; that on the said day the deceased herein was assigned to assist in the loading of electrical equipment on a barge on the Tanama River at the Big Delta River Bank, about 15 miles from the barracks; that the employer transported the deceased and several fellow employees to the job site; that the work was completed late in the afternoon and deceased and his fellow employees went to Rika's roadhouse about 500 feet from the job site; that the foreman told the employees that they could return on a truck which was leaving then or on one that would leave later; that the employer's trucks were the only means of transportation between Rika's roadhouse and the employer's bar-

racks; that deceased and other employees elected to return by the later truck; that the second truck left three to four hours after the first one; that deceased became intoxicated early in the evening; that at about 10 P.M. when the truck left he was able to get into the truck by himself; that this truck was a 1937 or 1938 V-8 1½ yard dump truck; that deceased rode in the body of the truck with Ray Johnston and Harold Johnston; that deceased was in a happy stage of intoxication; that when about four miles from the barracks and while deceased was standing in the body of the truck one of the wheels struck either a hole in the road or an obstruction, catapulting the deceased over the side of the truck; that he landed first on his feet and then slid forward about 20 feet; that neither of the rear wheels struck the deceased; that the deceased died from a broken neck almost instantly; that the death of the deceased was not occasioned solely by the intoxication of the deceased; that the death of the deceased arose out of and in the course of his employment;

That written notice of death was not given within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice;

That the employer did not furnish deceased with medical treatment as death was practically instantaneous;

That the average weekly wage of the deceased herein at the time of the injury exceeded \$37.50;

That the deceased employee was a widower; that

Phyllis Elaine Nutt, who was born February 13, 1930, Kenneth James Nutt, who was born February 26, 1928, and Raymond Albert Nutt, who was born December 11, 1925, are the surviving children of the deceased employee and as such are each entitled to receive death benefits at the rate of \$5.63 per week (15 per cent of \$37.50), subject to the provisions of the law; that such compensation is payable to Clark Nutt, who was legally appointed guardian of said children on June 8, 1943;

That Raymond Albert Nutt attained the age of 18 on December 11, 1943; that all death benefits to which Raymond Albert Nutt is entitled have accrued; that such death benefits amount to \$428.66 for the period June 26, 1942 to December 10, 1943, inclusive, a period of 76 1/7 weeks at the rate of \$5.63 per week;

That accrued death benefits to which Kenneth James Nutt and Phyllis Elaine Nutt are entitled amount to \$1767.82, for the period June 26, 1942, to June 28, 1945, inclusive, a period of 157 weeks at the rate of \$5.63 per week each;

That J. O. Watson, Jr., Attorney, has rendered legal services to claimant, the fair value of which is \$400.00;

That burial expenses amounted to \$691.97, which were paid by Clark Nutt; that the employer and the insurance carrier are liable to Clark Nutt in the amount of \$200.00;

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, C. F. Lytle Co. & Green Construction Co., and the insurance carrier, U. S. Fidelity & Guaranty Company, shall pay to Clark Nutt, as guardian of Raymond Albert Nutt, death benefits in behalf of said Raymond Albert Nutt at the rate of \$5.63 per week from June 26, 1942 to December 10, 1943, inclusive, a period of 761/7 weeks amounting to \$428.68;

That the employer, C. F. Lytle Co. & Green Construction Co., and the insurance carrier, U. S. Fidelity & Guaranty Company, shall pay to Clark Nutt, as guardian of Kenneth James Nutt and Phyllis Elaine Nutt, death benefits in behalf of said children at the rate of \$5.63 per week each, or a total of \$11.26 per week, from June 26, 1942 to June 28, 1945, inclusive, a period of 157 weeks, amounting to \$1767.82 and thereafter shall continue payments of death benefits at the rate of \$11.26 per week, payable in bi-weekly installments subject to the limitations of the law or until otherwise ordered.

That the employer, C. F. Lytle Co. & Green Construction Co., and the insurance carrier, U. S. Fidelity & Guaranty Company, shall pay to Clark Nutt in his individual capacity in reimbursement of their maximum liability for funeral expense, the amount of \$200.00.

A fee for legal services rendered the claimant in

his capacity as guardian is approved in favor of Attorney J. O. Watson in the sum of \$400.00, such amount to constitute a lien and be paid out of the award.

Given under my hand at Seattle, Washington this 3d day of July, 1945.

C. M. WHIPPLE

Deputy Commissioner,
Fourteenth Compensation
District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, and the attorney for the claimant, at the last known address of each as follows: Clark Nutt, Indianola, Iowa; C. F. Lytle Co. and Green Construction Company, Hoge Bldg., Seattle 4, Wash.; U. S. Fidelity & Guaranty Co., Central Building, Seattle 4, Wash.; J. O. Watson, Jr., 106 E. Salem Ave., Indianola, Iowa.

C. M. WHIPPLE

Deputy Commissioner

Mailed: July 3, 1945.

[Title of District Court and Cause.]

MOTION FOR PERMISSION TO INTERVENE

Comes Now Clark Nutt, through his attorney, Leo M. Koenigsberg, and respectfully moves the

court for permission to intervene in the above entitled cause upon the grounds and for the reason that he is the legally appointed guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, children of William Earnest Nutt, deceased employee for whose benefit compensation order award of compensation of the United States Employees Compensation Commission, 14th Compensation District, was issued on or about July 3, 1945, and which compensation order libellants seek to set aside.

This motion is based upon the files and records herein and the affidavit of L. M. Koenigsberg hereto attached.

LEO M. KOENIGSBERG

Attorney of Intervenor

[Endorsed]: Filed Nov. 5, 1945.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
PERMISSION TO INTERVENE

State of Washington,
County of King—ss.

L. M. Koenigsberg, being first duly sworn, upon oath deposes and says: that he has just been employed by Clark Nutt for the purposes of intervening in the above entitled cause; that Clark Nutt has employed your affiant so as to give assistance to the United States Attorney and the Assistant United

States Attorney in the preparation and defense of the above entitled cause; that your affiant received a telegram employing him on Friday, November 2, 1945, and has not had an opportunity to peruse the files and records and prepare in connection with the motion to dismiss now pending in the above entitled court; that your affiant desires, therefore, that said motion be continued to a date in the latter part of November.

L. M. KOENIGSBERG

Subscribed and sworn to before me this 5th day of November, 1945.

P. O. D. VEDOVA

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Nov. 5, 1945.

[Title of District Court and Cause.]

ORDER GRANTING PERMISSION TO
INTERVENE

This Matter came on regularly before the undersigned, one of the Judges of the above entitled court, and it appearing that Clark Nutt, guardian of the children of the deceased employee for whose benefit compensation order award of compensation was issued by the Deputy Commissioner of the United States Employees Compensation Commission, 14th Compensation District, has moved the court for permission to intervene, and the court being fully advised in the premises,

Now, therefore, it is

Ordered, Adjudged and Decreed that Clark Nutt be and is hereby granted permission to intervene in the above entitled cause.

Done in Open Court this 5th day of November, 1945.

JOHN C. BOWEN

Judge

Presented by:

LEO M. KOENIGSBERG

Attorney for Intervenor

By H. S. SANFORD

[Endorsed]: Filed Nov. 5, 1945.

In the District Court of the United States for the
Western District of Washington, Northern
Division

In Admiralty—No. 14797

C. F. LYTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation,
and UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Maryland corporation,
Libelants,

v.

C. M. WHIPPLE,

Respondent,

CLARK NUTT, Guardian of PHYLLIS ELAINE
NUTT, KENNETH JAMES NUTT and RAY-
MOND ALBERT NUTT, children of WIL-
LIAM EARNEST NUTT, Deceased,
Claimant.

ORDER GRANTING MOTION TO DISMISS

This Matter came on regularly for hearing before the undersigned, one of the Judges of the above entitled court, on Monday, November 19, 1945, at 10:30 o'clock a.m., and argument was concluded on the afternoon of the same day at or about 3:30 o'clock p.m., libellants appearing by Hayden, Merritt, Summers & Stafford, proctors for said libellants, respondent appearing by his attorney, Herbert O'Hare, Assistant United States Attorney, and claimant Clark Nutt, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased,

appearing by his attorney, Leo M. Koenigsberg, and it having been stipulated by and between the counsel for all parties that the transcript of all the testimony which was submitted to the Deputy Commissioner be considered part of the files and records in this cause, and briefs having been submitted by the libellants and the respondent, and the court having listened to argument of counsel for the libellants and for the claimant and being fully advised in the premises and motion having been made heretofore by respondent to dismiss petition for injunctive relief,

Now, therefore, it is

Ordered, Adjudged and Decreed that the motion to dismiss the libel to set aside the Deputy Commissioner's award as not being in accordance with law be and is hereby granted, and that the Deputy Commissioner's award of July 3, 1945, be and is hereby affirmed, and the libel herein is dismissed.

It Is Further Ordered, Adjudged and Decreed that legal services rendered to claimant Clark Nutt, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, by Leo M. Koenigsberg are of the reasonable value of \$200.00 and such amount to be paid out of the award herein affirmed and constitute a lien on the compensation now due or hereafter to become due to said claimant, and said libellants shall be permitted to satisfy said lien by deducting \$20.00 from each bi-weekly payment now due or hereafter to become due, making

said deductions until such time as the full sum of \$200.00 paid to Leo M. Koenigsberg has been fully satisfied.

The libellants except to all of the foregoing and the exception is hereby allowed.

Done in Open Court this 21 day of November, 1945.

JOHN C. BOWEN

Judge

Presented by:

L. M. KOENIGSBERG

Attorney for Claimant

O. K. as for form:

MERRITT, SUMMERS, BUCEY
& STAFFORD

By MATTHEW STAFFORD

Attorneys for Libelants.

Approved:

HERBERT O'HARE

Asst. U. S. Attorney

[Endorsed]: Filed Nov. 21, 1945.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 14797

C. F. LYTLE CO., et al,

Libellants,

vs.

C. M. WHIPPLE,

Respondent,

CLARK NUTT,

Intervenor.

COURT'S ORAL DECISION

(As announced from the Bench, November 19,
1945, by Judge Bowen.)

The Court: I believe that the Arkansas Court decision cited by Mr. Koenigsberg is not controlling upon the facts here for the reasons pointed out by Mr. Stafford. I am, however, mindful of the status and the function of this Court in this case, and I understand the statute and the authoritative decisions thereunder to mean that this Court cannot today try this case *de novo*; that the only function this Court has with respect to it is to review the action of the Deputy Commissioner, the Tribunal which did have authority to and did try the facts, to see if there is substantial evidence to support the findings and action of the Deputy Commissioner. If there is such substantial evidence, the Deputy Commissioner's action must be confirmed.

I do not hesitate to say that I feel that the Deputy Commissioner made a mistake in arriving at the decision and conclusions announced by him, but I am unable to say that as a matter of law there is no substantial evidence to support the action of the Deputy Commissioner. On the contrary, I am inclined to think there is some substantial evidence to support the Deputy Commissioner, notably the testimony of witness Berg, the truck driver, that he felt a jarring of the truck at the time of the accident, and for that reason it seems to me under the statute this Court is without authority to change the result arrived at by the Deputy Commissioner.

I repeat, however, that I think the Commissioner made a mistake. I think in view of the testimony of Ray Johnston as to what took place in respect to those things connected with the accident, that the more direct and positive proof in this case is more convincing that the decedent, while in a partially intoxicated condition and in a spirit of playfulness or bravado or acting under alcoholic stimulant, stepped out of that truck, himself, and that he was not thrown out of the truck by any jarring of the truck caused by rough roads. That is what I think about it, but I assume from the statute that my thought in the matter is of no concern in view of the fact that this Court cannot hold as a matter of law that there is no substantial evidence to support the Deputy Commissioner's action.

In view of the foregoing, the action of the Deputy Commissioner will have to be confirmed, and all requests of the employer and the insurance carrier

contrary to such action are denied. It is the opinion of the Court that the motion to dismiss the libel of the employer and insurance carrier must be granted.

(Discussion as to the Attorney's fee.)

Concluded.

[Endorsed]: Filed Nov. 30, 1945.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. M. Whipple, respondent in the above-entitled cause; and

To J. Charles Dennis, United States Attorney, and Herbert O'Hare, Assistant United States Attorney, Proctors for said respondent;

To Clark Nutt, guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, minor children of William Earnest Nutt, deceased, claimant in said cause; and

To Leo M. Koenigsberg, Proctor for said claimant;

To The Honorable Judges of the above-entitled court; and to The Clerk of said court:

You, and each of you, will please take notice that C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, Libelants in the above entitled

cause, and American Surety Company of New York, a New York corporation, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants,

Hereby Appeal from that certain order or final decree in said cause, against said libelants, and in favor of said respondent and said claimant, which was signed by the Honorable John C. Bowen, Judge of the above-entitled court, filed with the clerk of said court and entered in said cause on November 21, 1945; hereby appealing from the whole of said order or final decree, and from each and every part thereof, unto the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 4th day of December, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for said Libelants, C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, and said Stipulator American Surety Company of New York.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

C. F. Lytle, an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, libelants in the above-entitled cause, and American Surety Company of New York, a New York corporation, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants, hereby respectfully assign errors in the proceedings in said cause and in the findings, conclusions and rulings of the above-entitled court, and its order or final decree signed, entered and filed in said cause on November 21, 1945, as follows:

(1) The court erred in finding, concluding and holding that the record of the proceedings before the Deputy United States Compensation Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment; and in failing to find, conclude and hold the contrary.

(2) The court erred in finding, concluding and holding that said record did not affirmatively establish, so as not to permit any conflicting inference, that the death of William Earnest Nutt was occasioned solely by his intoxication; and in failing to find, conclude and hold the contrary.

(3) The court erred in granting the motion of respondent C. M. Whipple to dismiss the libel

of libelants herein; and in failing to deny said motion.

(4) The court erred in entering the order or final decree on November 21, 1945, granting said motion to dismiss, and dismissing said libel.

Dated this 4th day of December, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for said Libelants, C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, and said Stipulator American Surety Company of New York.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United States Fidelity and Guaranty Company, a Maryland corporation, being the Libelants in the above entitled cause, and American Surety Company of New York, a New York corporation, the stipulator or surety upon the stipulation for costs heretofore filed in said cause by said libelants, as Principals, and Maryland Casualty Company, a corporation

duly organized and existing under and by virtue of the laws of the state of Maryland, and authorized to transact the business of surety in the state of Washington, as Surety, are held and firmly bound unto C. M. Whipple, the respondent in said cause, being the Deputy Commissioner of the United States Employees Compensation Commission, for the Fourteenth Compensation District, and/or his successor in such office, and unto Clark Nutt, as guardian of Phyllis Elaine Nutt, Kenneth James Nutt, and Raymond Albert Nutt, minor children of William Earnest Nutt, deceased, the claimant in said cause, and/or his successor as said guardian, in the sum of Two Hundred Fifty Dollars (\$250.00) in lawful money of the United States, for the full and complete payment of which, well and truly to be made, we, and each of us, hereby bind ourselves and our respective successors and assigns, jointly and severally, firmly by these presents;

The condition of this obligation being as follows, to-wit:

Whereas an order or final decree was entered in the above-entitled court and cause against said libelants and in favor of said respondent and said claimant on November 21, 1945; and said above named Principals are about to take an appeal from said order or final decree, and each and every part thereof, unto the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, if said above bounden Principals shall pay all costs that may be awarded

against them, or any of them if said appeal be dismissed or the order or final decree appealed from affirmed; then this obligation shall be void; otherwise, it shall remain in full force and effect.

Signed and sealed this 3d day of December, 1945.

C. F. LYTLE CO.,

GREEN CONSTRUCTION CO.,

UNITED STATES FIDELITY AND GUAR-

ANTY COMPANY, and AMERICAN

SURETY COMPANY OF NEW YORK,

By MERRITT, SUMMERS, BUCEY & STAF-

FORD,

MATTHEW STAFFORD,

G. H. BUCEY,

As Their Proctors (Principals).

MARYLAND CASUALTY COMPANY,

[Seal]

By CHARLES NEALEY,

Atty. in Fact (Surety).

[Endorsed]: Dec. 4, 1945.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To The Honorable Judges of the Above-Entitled Court:

C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation. and United States Fidelity and Guaranty Company, a Maryland corporation, libelants in the above-entitled cause, and American Surety Company of New

York, a New York corporation, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants, and each of them, being aggrieved by that certain order or final decree, signed, filed and entered in the above-entitled cause on the 21st day of November, 1945, hereby claim an appeal from the whole of said order or final decree, and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby pray that such appeal may be allowed forthwith by order of the above-entitled court, upon their notice of appeal and assignments of error, heretofore filed herein and duly presented herewith, without issuance of citation.

Dated this 4th day of December, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for said Libelants C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, and said Stipulator American Surety Company of New York.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE AND
CONSENT

Service on this day of the Notice of Appeal, Petition for Appeal, and Assignments of Error, in the

above-entitled cause, of C. F. Lytle Co., Green Construction Co., United States Fidelity and Guaranty Company, the libelants in said cause, and American Surety Company of New York, the stipulator or surety upon the stipulation for costs herein of said libelants; all of which have been filed in the above-entitled court and cause; and service of copy of proposed order granting petition for appeal and allowing said appeal; are hereby acknowledged; and consent is hereby given that presentation of said Notice of Appeal, Petition for Appeal, Assignments of Error, and Order, may be made to, and hearing thereon had in the above-entitled court before, Honorable John C. Bowen, judge of said court, on the 4th day of December, 1945, at 1:55 o'clock P. M. thereof, or as soon thereafter as said presentation and hearing may be had; and that if said appeal be allowed, no citation need be issued thereon.

Dated this 4th day of December, 1945.

J. CHARLES DENNIS,
United States Attorney.

HERBERT O'HARE,
Assistant United States Attorney, Proctors for respondent above-named.

L. M. KOENIGSBERG,
Proctor for Claimant Above-Named.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR APPEAL

The above-entitled cause having come on duly and regularly for hearing on this day before the above-entitled court, the undersigned judge presiding, upon the petition for appeal of C. F. Lytle Co., Green Construction Co., United States Fidelity and Guaranty Company, libelants in said cause, and American Surety Company of New York, the stipulator or surety upon the stipulation for costs filed in said cause by said libelants, which was then presented to this court, together with notice of appeal and assignments of error of said libelants and said stipulator, heretofore filed herein on this day, and there also being presented therewith the cost bond on appeal, filed herein on this day by said libelants and said stipulator, together with acknowledgment of service and consent signed by the proctors for the respondent and claimant in said cause; and the court having duly considered all of said matters, and being fully advised in the premises;

Does hereby order and adjudge that said petition for appeal is granted and said appeal allowed as prayed for in said petition; and that no citation on said appeal be issued.

Done in open court this 4th day of December, 1945.

JOHN C. BOWEN,

United States District Judge.

Presented by:

C. H. BUCEY,

Of Proctors for Said Libelants and Said Stipulator.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service on this 4th day of December, 1945, of Notice of Appeal, this day filed herein by the above named libelants, and the stipulator or surety upon their stipulation for costs herein, and service on this day of Order Granting Petition for Appeal of said parties, as signed, filed and entered in the above-entitled District Court on this day, are hereby acknowledged.

J. CHARLES DENNIS,

United States Attorney.

HERBERT O'HARE,

Assistant United States Attorney.

Proctors for Respondent
Above-Named.

LEO M. KOENIGSBERG,

By H. S. SANFORD,

Proctor for Claimant Above-Named.

[Title of District Court and Cause.]

AMENDED STIPULATION AS TO RECORD
OR APOSTLES ON APPEAL

It Is Stipulated by and between the appellants in the above-entitled cause, C. F. Lytle Co., Green Construction Co., and United States Fidelity and Guaranty Company, being the libelants therein, and American Surety Company of New York, being the stipulator or surety upon the stipulation for costs of said libelants; and the appellees therein, C. M. Whipple, being the respondent in said cause, and Clark Nutt, guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, minor children of William Earnest Nutt, deceased, being the claimant therein, as follows:

I.

That for the purposes of the appeal by said appellants to the United States Circuit Court of Appeals for the Ninth Circuit, referred to in the Notice of Appeal and Petition for Appeal filed in said cause by said appellants on December 4, 1945, there shall be included in the printed record or apostles on appeal the following:

(1) The libel of C. F. Lytle Co., et al, filed herein on July 19, 1945 (omitting therefrom the copy of compensation order and award of compensation of the Deputy Commissioner).

(2) The libelants' Stipulation for Costs, on which said American Surety Company of New

York is stipulator or surety, filed herein on July 19, 1945.

(3) Libelants' Application for Interlocutory Injunction, filed herein on July 19, 1945.

(4) Minute entry of order of court rendered August 6, 1945, denying libelants' application for interlocutory injunction.

(5) Respondent C. M. Whipple's Motion to Dismiss the Libel, filed herein on October 3, 1945.

(6) Certification dated at Seattle, Washington, on October 31, 1945, and signed by C. M. Whipple, Deputy Commissioner.

(7) The following items, and only the following items, from the record so certified by C. M. Whipple, Deputy United States Compensation Commissioner, which record was filed herein on November 1, 1945:

(a) Item No. 40, consisting of a transcript of proceedings before William M. Growden, United States Commissioner and ex-officio Coroner, Fairbanks Precinct, Fourth Judicial Division, Alaska, in the matter of the inquest upon the body of Willian Earnest Nutt, deceased, at Fairbanks, Territory of Alaska, on July 29, 1942;

(b) Item No. 41, consisting of deposition on written interrogatories of A. A. Lyon;

(c) Item No. 42, consisting of deposition on written interrogatories of W. H. Green;

(d) Item No. 43, consisting of deposition on written interrogatories of Ralph Green;

(e) Item No. 44, consisting of deposition on written interrogatories of Robert L. Nine;

(4) Item No. 45, consisting of compensation order, award of compensation, filed July 31, 1945.

(8) Motion of Clark Nutt for permission to intervene, filed herein on November 5, 1945.

(9) Affidavit in support of said motion, filed herein on November 5, 1945.

(10) Order granting permission to intervene, signed, filed and entered herein on November 5, 1945.

(11) Court's oral decision (as announced from the bench, November 19, 1945, by Judge Bowen), sustaining respondent's motion to dismiss the libel, the written memorandum of which decision was filed herein on November 30, 1945.

(12) Order or final decree granting motion to dismiss libel, signed, filed and entered herein on November 21, 1945.

(13) Notice of appeal of the appellants above named, filed herein on December 4, 1945.

(14) Bond for costs on appeal of said appellants, with Maryland Casualty Company as surety thereon, filed herein on December 4, 1945.

(15) Assignments of error, filed herein on December 4, 1945.

(16) Petition for appeal, filed herein on December 4, 1945.

(17) Acknowledgment of service of notice of appeal, etc., and consent to presentation of order allowing appeal, filed herein on December 4, 1945.

(18) Order granting petition for appeal, signed, filed and entered herein on December 4, 1945.

(19) Acknowledgment of service of order granting petition for appeal, filed herein on December 4, 1945.

(20) Order of court, if entered herein, providing for transmission of original record certified by the Deputy United States Compensation Commissioner, as stipulated in paragraph (6) hereof.

(21) This stipulation.

(22) Praecipe for record or apostles on appeal.

II.

It is further Stipulated that, although no other portions of the record certified by C. M. Whipple, Deputy United States Compensation Commissioner, filed herein on November 1, 1945, are to be printed in the record of apostles on appeal herein, the court is at liberty to consider any or all other parts of said record so certified by C. M. Whipple, the original of which has been transmitted by the clerk of the above-entitled court to the clerk of the United

States Circuit Court of Appeals for the Ninth Circuit, in lieu of copy thereof.

Dated: January 16, 1946.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY, Per M. S.,

Proctors for Said Appellants.

J. CHARLES DENNIS,
United States Attorney.

TOM A. DUNHAM,
Assistant U. S. Attorney.

Proctors for Said Appellee,
C. M. Whipple.

LEO M. KOENIGSBERG,
Proctor for Said Appellee,
Clark Nutt.

United States of America,
Western District of Washington—ss.

CERTIFIED COPY

I, Millard P. Thomas, Clerk of the United States District Court in and for the Western District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Amended Stipulation as to Record or Apostles on Appeal filed on January 17, 1946, in Cause No. 14797, C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, and United

States Fidelity and Guaranty Company, a Maryland corporation, Libelants, vs. C. M. Whipple, Respondents, Clark Nutt, guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, Claimant, now remain among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-said Court at Seattle this 18th day of January, A. D. 1946.

(Seal) MILLARD P. THOMAS,
Clerk.

By M. BROOKS,
Deputy Clerk.

[Endorsed]: Filed Jan. 17, 1946.

[Title of District Court and Cause.]

PRAECIPE FOR RECORD OR APOSTLES
ON APPEAL

To the Clerk of the Above-Entitled Court:

Utilizing copies or transcript filed herewith, you hereby are requested to prepare in the above-entitled cause record or apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, supplementing and comparing such copies or transcript to the extent necessary to make, index and certify full, true and complete record or

apostles on appeal, as required by Rule 5 of the Admiralty Rules of said appellate court, and/or by Rule 75 of the Federal Rules of Civil Procedure, containing the items specified in the stipulation as to record or apostles on appeal, filed herein; all other motions, stipulations, orders, and other matters, if any, filed subsequent to December 4, 1945, prior to certification of said record or apostles, relating to or in connection with the appeal herein; and this praecipe.

Dated December 7, 1945.

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for Appellants, C. F. Lytle Co., Green Construction Co., United States Fidelity and Guaranty Company, and American Surety Company of New York.

Copy received December 7, 1945.

J. CHARLES DENNIS,
United States Attorney.
Proctor for Appellee, C. M.
Whipple.

L. M. KOENIGSBERG,
Proctor for Appellee, Clark
Nutt, guardian, etc.

[Endorsed]: Filed Dec. 7, 1945.

[Title of District Court and Cause.]

ORDER AUTHORIZING TRANSMISSION
OF ORIGINAL RECORD

Upon motion of appellants, and in accordance with stipulation of appellants and appellees, on file in the above entitled cause, it appearing to the court proper;

It hereby is Ordered that, in connection with the appeal of said appellants to the United States Circuit Court of Appeals for the Ninth Circuit, in the said cause, that certain original record certified by C. M. Whipple, Deputy United States Compensation Commissioner, and filed herein on November 1, 1945, shall be withdrawn by the clerk of this court from the files herein, and transmitted to the clerk of said appellate court, in lieu of copies, and as part of said appellants' record or apostles on appeal in said cause.

Done in open court this 7th day of December, 1945.

Presented by:

G. H. BUCEY,

Of Proctors for Said Appel-
lants.

JOHN C. BOWEN,

United States District Judge.

We consent to entry of the foregoing order.

J. CHARLES DENNIS,
United States Attorney.

Proctor for Said Appellee,
C. M. Whipple.

L. M. KOENIGSBERG,
Proctor for Said Appellee,
Clark Nutt, Guardian, etc.

[Endorsed]: Filed Dec. 7, 1945.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 48, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Praeceptum and Designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that

the same, together with Record certified by C. M. Whipple, Deputy United States Compensation Commissioner, filed on November 1, 1945, the original of which is sent up as part of this record, constitute the apostles on appeal from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act of February 11, 1925) for making Record, certificate or return:

15 folios at 15c	\$ 2.25
118 folios at 05c	5.90
Appeal fee (Section 5 of Act).....	5.00
Certificate of Clerk to Apostles on Appeal....	.50
Certificate of Clerk to Record Certified by C. M. Whipple50
<hr/>	
Total	\$14.15

I further certify that the above amount has been paid to me by the proctors for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District

Court at Seattle, in said District, this 21st day of December, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk.

By PERCY MADDUX,

Deputy.

[Endorsed]: No. 11217. United States Circuit Court of Appeals for the Ninth Circuit. C. F. Lytle Co., an Iowa corporation, Green Construction Co., an Iowa corporation, United States Fidelity and Guaranty Company, a Maryland corporation, and American Surety Company of New York, a New York corporation, Appellants, vs. C. M. Whipple, Deputy United States Compensation Commissioner for the Fourteenth Compensation District, and Clark Nutt, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 26, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

In Admiralty—No. 11217

C. F. LYTLE CO., an Iowa corporation, GREEN
CONSTRUCTION CO., an Iowa corporation,
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Maryland corporation,
and AMERICAN SURETY COMPANY OF
NEW YORK, a New York corporation,
Appellants,

vs.

C. M. WHIPPLE, Deputy United States Compen-
sation Commissioner for the Fourteenth Com-
pensation District, and CLARK NUTT, guard-
ian of Phyllis Elaine Nutt, Kenneth James
Nutt and Raymond Albert Nutt, children of
William Earnest Nutt, Deceased,
Appellees.

APPELLANTS' STATEMENT OF POINTS,
AND DESIGNATION OF PARTS OF REC-
ORD.

To the Honorable Judges of the Above-Entitled
Court:

Appellants herein, C. F. Lytle Co., Green Con-
struction Co., United States Fidelity and Guaranty
Company, and American Surety Company of New
York, hereby refer to and adopt as their Statement
of Points on which they intend to rely upon their

appeal, all of their assignments of error, included in the apostles on appeal (pages 30 and 31); and

Said appellants, as their Designation of Parts of the Record which they deem necessary for consideration on said appeal, hereby designate all of said apostles on appeal (pages 1 to 48), including the original record certified by C. M. Whipple, Deputy United States Compensation Commissioner, which is part of said apostles on appeal, in accordance with the stipulation of December 7, 1945, shown in said apostles (pages 41 to 44), including all portions of the record specified in appellants' praecipe, shown in said apostles (pages 45 and 46).

Respectfully submitted,

MERRITT, SUMMERS, BUCEY
& STAFFORD.

MATTHEW STAFFORD,
G. H. BUCEY,

Proctors for Said Appellants.

Copy received December 21, 1945.

J. CHARLES DENNIS,

United States Attorney.

Proctor for Appellee, C. M.
Whipple.

L. M. KOENIGSBERG,

Proctor for Appellee, Clark
Nutt, Guardian, etc.

[Endorsed]: Filed December 26, 1945. Paul P.
O'Brien, Clerk.



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. F. LYTLE Co., an Iowa corporation, GREEN CONSTRUCTION Co., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation, *Appellants*,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner, for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

MERRITT, SUMMERS, BUCEY & STAFFORD,
Proctors for Appellants.

Office and P.O. Address:
840 Central Building,
Seattle 4, Washington.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. F. LYTLE Co., an Iowa corporation, GREEN CONSTRUCTION Co., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation, *Appellants*,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner, for the Fourteenth Compensation District, and CLARK NUTT, Guardian of Phyllis Elaine Nutt, Kenneth James Nutt and Raymond Albert Nutt, children of William Earnest Nutt, deceased, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

MERRITT, SUMMERS, BUCEY & STAFFORD,
Proctors for Appellants.

Office and P.O. Address:
840 Central Building,
Seattle 4, Washington.



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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

C. F. LYTLE Co., an Iowa corporation,
GREEN CONSTRUCTION Co., an Iowa
corporation, UNITED STATES FIDELITY
AND GUARANTY COMPANY, a Maryland
corporation, and AMERICAN SURETY
COMPANY OF NEW YORK, a New York
corporation,

Appellants,

vs.

C. M. WHIPPLE, Deputy United States
Compensation Commissioner, for the
Fourteenth Compensation District, and
CLARK NUTT, Guardian of Phyllis
Elaine Nutt, Kenneth James Nutt, and
Raymond Albert Nutt, children of Wil-
liam Earnest Nutt, deceased,

Appellees.

No. 11217

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

BASIS OF JURISDICTION

This is a proceeding in which appellants seek to have suspended and set aside a compensation order and award of compensation made and filed by the Deputy Commissioner for the Fourteenth Compensation District of the United States Employees' Compensation Commission as more particularly set forth in

the libel of appellants (R. 2-7). The jurisdiction of the United States District Court and of the United States Circuit Court of Appeals for the Ninth Circuit is sustained by Section 21 of Public Law 803 of the 69th United States Congress, as amended by Section 3(b) of Public Law 208 of the 77th United States Congress, as amended, which statutes are set forth in Title 33 U.S.C.A., Sec. 921 and in Title 42 U.S.C.A., Sec. 1653(b). Also in support of appellants' position that this court has jurisdiction appellants cite *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. (2d) 513; *Kobilkin v. Pillsbury*, 103 F.(2d) 667, affirmed by an equally divided court in *Kobilkin v. Pillsbury*, 309 U.S. 619, 60 S. Ct. 465 (petition for rehearing denied in 309 U.S. 695, 60 S. Ct. 584).

STATEMENT OF THE CASE

During the evening of June 26, 1942, William Earnest Nutt, an employee of appellants C. F. Lytle Co. and Green Construction Co., left a roadhouse near Big Delta, Alaska. He was one of three passengers riding in the open dump body of one of his employer's trucks. He was intoxicated. Shortly thereafter, and during the ride, he sustained fatal injuries. Minor children of William Earnest Nutt, acting through their guardian, filed in the office of the United States Employees' Compensation Commission for the Fourteenth Compensation District at Seattle, C. M. Whipple, Deputy Commissioner, a claim for compensation on account of the death of William Earnest Nutt under the provisions of Public Law 208 of the 77th United States Congress, Act of August 16, 1941, as amended (42 U.S.C.A. Sec. 1651). Proceedings on that claim before the Deputy Commissioner resulted in the filing by the Deputy Commissioner on July 3, 1945, of a compensation order and award of compensation favorable to the claimants and unfavorable to the employer and carrier named in the claim who are appellants here.

The questions involved in this appeal are these:

(1) Is there any substantial evidence in the record, upon which the compensation order herein complained of is based, that the death of William Earnest Nutt arose out of and in the course of his employment?

(2) Does that record affirmatively establish, so as not to permit any conflicting inference, that the death

of William Earnest Nutt was occasioned solely by his intoxication?

These questions were brought before the District Court by appropriate proceedings for review of the compensation order of July 3, 1945, under and according to the provisions of Section 3(b) of Public Law 208 of the 77th United States Congress, as amended (Title 42 U.S.C.A., Sec. 1653(b)), and Section 21(b) of Public Law 803 of the 69th United States Congress, as amended (Title 33 U.S.C.A., Sec. 921(b)), and as extended by said Public Law 208.

SPECIFICATION OF ERRORS RELIED UPON

Appellants rely upon assigned errors Nos. (1), (2), (3), and (4), which are set forth on pages 115 and 116 of the Apostles on Appeal.

ARGUMENT OF THE CASE

It is the position of the appellants that the compensation order and award of compensation of July 3, 1945, for the review of which this suit has been brought, is not in accordance with law

“Because the record upon which the compensation order and award of compensation is based contains no substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and because the same record establishes affirmatively that the death of William Earnest Nutt was occasioned solely by the intoxication of said William Earnest Nutt.”
(Art. VII, Libel, R. 5, 6)

To obtain clarity and to avoid repetition appellants do not segregate their argument in respect of assigned errors (1) and (2) which are:

(1) The court erred in finding, concluding and holding that the record of the proceedings before the Deputy United States Compensation Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment; and in failing to find, conclude and hold the contrary (R. 115).

(2) The court erred in finding, concluding and holding that said record did not affirmatively establish, so as not to permit any conflicting inference, that the death of William Earnest Nutt was occasioned solely by his intoxication; and in failing to find, conclude and hold the contrary (R. 115).

The Deputy Commissioner's compensation order

award of compensation of July 3, 1945, contains specific findings by the Deputy Commissioner

“that deceased became intoxicated early in the evening” and “that deceased was in a happy stage of intoxication.” (R. 101)

Appellants omit as needless exercise the detailing of the more than ample evidence from which the Commissioner made those findings; no question is raised regarding those findings on this appeal.

This review must begin, therefore, with the acceptance as facts that the deceased became intoxicated early in the evening of June 26, 1942 (the date on which he met his death (R. 101)), and that he was intoxicated during the ride which resulted in his death.

The Commissioner, having found as a fact that the deceased was intoxicated at the time of the accident which resulted in his death, would logically be expected to make findings in respect of the questions:

(a) Was the decedent's death due to a peril or risk involved in or incidental to the deceased's employment or to the conditions under which deceased's employment was required to be performed, and

(b) Was the decedent's death due solely to decedent's intoxication?

With all respect, appellants suggest that the Commissioner failed to give due consideration to these, and particularly to the first of these questions. The language of the Commissioner's compensation order award of compensation (R. 99) when read in its entirety in the light of the record leaves the impres-

sion that the Commissioner assumed that the deceased was in the course of his employment when he left the roadhouse in the truck; that the deceased's actions in standing up in the truck (R. 39, 52) and in stepping over the side of the truck (R. 39) did not constitute any departure by deceased from the course of his employment; that the deceased's statements, which were coincidental with his standing up in and stepping from the truck, that there was a moose out there (R. 39) and "Let's get out and walk" (R. 39) did not manifest any intent on the part of deceased to embark on a venture of his own; most importantly, that as long as deceased was in his employer's truck, regardless of how outrageously he might have conducted himself, he remained in the course of his employment, and, therefore, that the only question which the Commissioner had to decide was whether he voluntarily stepped or jumped from the truck or was thrown from the truck by reason of a bump or jolt.

While it is the view of appellants that the question whether he stepped or jumped from the truck or was bounced out of the truck is not controlling, appellants regard an analysis of the Commissioner's and of the District Court's dispositions of that question as useful and necessary in this brief.

Keeping in mind that the deceased was intoxicated during the entire period which elapsed between the time the truck upon which he was riding left the roadhouse and the time at which deceased met his death, we respectfully ask the court critically to examine the fol-

lowing portion of the Commissioner's findings and the evidence in this record which is relevant to this portion of the findings. The findings are these:

"* * * that when about four miles from the barracks and while deceased was standing in the body of the truck, one of the wheels struck either a hole in the road or an obstruction, catapulting the deceased over the side of the truck; that he landed first on his feet and then slid forward about twenty feet; that neither of the rear wheels struck the deceased; that the deceased died from a broken neck almost instantly * * *." (R. 101)

Separated for the purpose of this examination the important facts contained in this language are these:

- (a) Deceased was standing in the body of the truck;
- (b) One of the wheels struck either a hole in the road or an obstruction;
- (c) Deceased was catapulted over the side of the truck by reason of the wheel so striking;
- (d) Deceased landed first on his feet.

There are to be noticed some facts established without dispute in the record in respect of which no reference or finding is made by the Commissioner. We refer to the description of the truck given by United States Marshal Buckley which is contained in this record (R. 32). Mr. Buckley states that the truck was a dump truck with a dump box on the rear; that the floor of the box was about four feet off the ground; that the sides of the box rose about eighteen inches above the floor of the box. We refer also to some facts contained in the testimony of Ray Johnston, which we

regard of controlling importance, which will be discussed in detail herein.

Most important of all is the fact that, although there were six men riding in the truck, including the driver, only one of these men saw the accident occur. He was Ray Johnston. Messrs. Brown and Welchell were riding in the cab of the truck. Welchell says that he did not see the accident happen, but that two minutes earlier he looked back and that “* * * they were all laughing and talking * * *” (R. 27); Brown testified that “* * * a few minutes before the truck stopped I glanced back and saw Ernie (the deceased) standing up in the truck * * *” (R. 52); Berg knew nothing of the accident happening; Jack Johnston, although he was not in the cab but in the dump box, testified that he was not looking at the time, did not see the accident and that the first he knew of the accident was when he saw the deceased as the latter was rolling along the ground behind the truck. This means that the only direct evidence—in fact the only evidence, direct or circumstantial, which this record contains relating to the manner of the happening of this accident, is the testimony of Ray Johnston.

The testimony of Ray Johnston is of such importance in this case that appellants deem it advisable to set it forth in full. It should be noted that his testimony was given in response to oral interrogatories propounded by Mr. Harry O. Arend, Assistant United States Attorney at Fairbanks, Alaska, during a formal Coroner's inquest upon the body of William Earnest Nutt, deceased, and also in response to questions propounded by the Coroner's jury and the Coroner

himself. The testimony of Ray Johnston (R. 37) follows:

"RAY JOHNSTON, being first duly sworn, testified as follows:

Q State your full name?

A Ray Edward Johnston.

Q Where do you live, Mr. Johnston?

A Guernsey, Iowa.

Q Where are you temporarily residing?

A At Lytle and Green, Big Delta.

Q Were you acquainted with William Ernest Nutt?

A Yes, sir.

Q How long had you known him?

A Well, for the length of his stay out there—between 3 and 4 weeks.

Q Did you see him last Friday, June 26th?

A Yes, sir.

Q Where did you see him at that time?

A The last time I seen him—you mean alive?

Q Yes.

A Was getting out of the truck.

Q Where at?

A Four or five miles North or South of Big Delta.

Q At that time you saw him get out of the truck. What kind of truck?

A V-8 dump truck. About a 39 or 40.

Q Who all was in the truck?

A There were five of us. Otto Berg, Jimmy Brown, Harold Johnston, Carl—I don't know Carl's last name—no, Walter. And myself.

Q Where were you sitting at the time?

A I was sitting in the left hand corner in the back of the truck on the floor.

Q Who else was in the back?

A Harold Johnston was sitting in the back and Ernie was sitting in the right side.

Q Is Harold related to you?

A My brother.

Q Do they call him Jack?

A That's right.

Q Who was in the front? Who was driving?

A Otto Berg was driving.

Q Who was with him up in front?

A Otto was driving and there was Walter and Jimmy Brown.

Q How did Nutt get out of the car—truck?

A He raised up and just stepped out—whether accidentally or how—but that's how he done it.

Q You say he stepped out?

A That's right.

Q Did he have to make any effort?

A No.

Q Did you see him get up and get out?

A Yes, sir.

Q Will you demonstrate just how he did it?

A He just got up and raised his foot over like that (demonstrating) and said, 'Let's get out and walk.' I thought he was joking and didn't think he meant it.

Q How fast was the car going?

A I wouldn't think over 15 miles an hour.

Q Did he make any other statement right at the time or just before?

A Yes. He said just before that he saw a moose down there and said 'Let's go get it.' I

pushed him back and said 'These are rough roads. You'll fall out,' and didn't think anything more of it.

Q What did you do after he stepped out?

A I jumped out of the back end and went back where he was lying.

Q Did the car keep on going?

A For a slight ways, yes.

Q What did you find?

A He was lying there on his back. I started to give him artificial respiration. I thought he had his breath knocked out.

Q Did he hit himself on any part of the truck?

A Not that I seen.

Q Did you feel anything when he left the truck?

A No, I didn't. When he left I grabbed the back end and jumped out.

Q Can you give any reason for him acting like this?

A No. Any more than just joking.

Q Had he been drinking?

A Slightly.

Q Was he drunk?

A I wouldn't say that he was, no.

Q Is there anything you can add that would make it easier for the jury to determine the actual cause of the death?

A I don't know what it would be.

Q Did he seem to have any financial worries?

A He was happy and laughing when he done that.

Q Had you ever observed him drinking before that?

A I don't believe I ever have.

Q He had never been drunk in your presence?

A No.

Q Do you think in your own mind that he knew what he was doing?

A I think he knew what he was doing but I think he was just joking. I don't think he intended to go that far.

QUESTION BY JURY: Do you think when he stepped over the edge of the truck body he apparently thought that he would step out on the ground—was he in that sort of mental condition—so that his body could have turned over?

A I don't think he figured on letting his foot go down there that far.

Q He would have a tendency of stepping over the edge to bring him in a sort of revolving motion and the wheel might catch him if he was far enough ahead of the hind wheel? Were there any chains on the side of the truck?

A I don't think there was. I don't believe there was a chain hanging on the side of the truck.

QUESTION BY CORONER: When he went over the side you saw him clear the bed of the truck?

A Yes.

Q He didn't hang to the truck?

A He went real quick. I jumped out at the same time because I knew he had been hurt.

QUESTION BY JURY: When he hit the ground did he hit with his feet?

A I thought he hit with his feet and then rolled over on his shoulder and head.

MR. AREND: If he stepped out of there how did he happen to hit the ground so as to make an impression of both feet?

A It is quite a ways from the side of the truck to the ground. It is several feet down. Those things happen so quick it is hard for a person to see."

Second in importance only to the testimony of Ray Johnston is the testimony of John J. Buckley, Chief Deputy United States Marshal for the Fourth Judicial Division of the Territory of Alaska. That testimony (R. 32), which was given at the same inquest as that at which the testimony of Ray Johnston was given, follows:

"JOHN J. BUCKLEY, being first duly sworn, testified as follows:

Q Your name is John J. Buckley?

A Yes, sir.

Q You are the Chief Deputy Marshal for this Division?

A Yes, sir.

Q Were you acquainted with William Ernest Nutt?

A No, I wasn't. Not until after his death.

Q Did you see his body after his death?

A Yes, sir.

Q On what day?

A On Saturday. Last Saturday, June 27th.

Q At what time?

A About 3 o'clock A. M.

Q Where?

A About 3 miles south of Big Delta on the Richardson Highway.

Q In what kind of surroundings?

A He was laying in the road with his feet toward the bank of the road, lying on the shoulder

of the road with his head quite close to the travel marks on the road. As a matter of fact, it was right on the edge of the travel wear of the road. Lying with his face looking towards the woods on the right hand side of the road going out.

Q Were his feet pointing to Fairbanks or towards Valdez?

A Right at that spot I don't know the directions but he was on the right hand side of the road with his feet pointing toward the ditch.

Q Right hand?

A He was lying this way (motioning) with his feet toward the ditch. Right on the shoulder.

Q More cross ways of the road?

A He was directly across the road.

Q Any part of his body in the road bed?

A His head was on the outside of the regular travel of the road.

Q Just outside?

A You would have to turn out around him to get around. There were marks there where cars had traveled.

Q Was anyone else there?

A Jim Brown and Ray Johnston and the book-keeper for Lytle and Green. I don't recall his name.

Q Did anyone else go out with you?

A Mr. Growden, U. S. Commissioner and I and Patrolman Buster Anderson.

Q Did you make an inquiry there as to the cause of this man's death?

A Yes.

Q What did you find?

A I found out from Ray Johnston who was

watching the body that they had been down to Big Delta and I found out later that they had been sent to Big Delta by the foreman to make some repairs on the boat which they had done and had been scheduled to go home about 8 or 8:30 in the evening. A man by the name of Otto Berg wasn't going back until later and these men, Nutt and the two Johnston brothers and one other decided to stay there and wait for Otto Berg. They had been drinking considerable and my information was that Nutt had drunk very heavily and had passed out. They put him in bed and he got up and seemed to be all right—got into the truck by himself and the three of them sat in the truck with their backs toward the cab. They traveled about three miles to where the body was when Ray Johnston said that Ernest Nutt made the remarks: 'There's a moose out there. Here's where I get off.' The next thing they knew he was gone, whether he fell out or jumped out. Johnston wasn't altogether sober. It appears that the ground at the point where he hit the ground was on a straight of way after they had gone around a small curve and had got out into the straight of way on the road and traveled 200 feet from the curve, and showed marks where he hit the ground apparently with his feet spread out. You could see where the ground was broke, and then evidently he went over on his head and face and slid on the ground. His right shoulder had a little bruise. His left side was all bruised and scratched and along his face where the flesh had hit, the gravel was ground into the side of his face. The body was warm when we got there. Both the Commissioner and myself looked for wounds on the body—picked up his head and I believe—we were certain his neck was broken

because the neck was twisted around as though there was nothing there to hold it and we could feel what we thought was a broken vertebra—about the fourth vertebra from the skull. There was no other marks on the body except the evidence that he slid. I stepped that off from the place where he hit and the body had not been disturbed and it was about 20 feet. Otto Berg was questioned as to what speed he was traveling when he went around the curve and he said between 20 and 25 miles, and that was possible. After he got around this curve he felt the dual tire jump up in the air and strike the ground again. He stopped the car. He didn't know at the time that Nutt had gone over. He was of the opinion that the dual tire on the right hand side of the car struck Nutt when he went over. The examination of the truck we made, the position Nutt was sitting, he couldn't have jumped out of the truck and been hit by the wheels. The car would be by him when he hit the ground. But that might be explained—that jar might be explained that when he got up he had to spring from the bottom of the truck to get out and he might have thought that was the jar. The clothing—he had on a slicker—one of these oil slickers—the marks on his left arm showed no imprint of any tire. Neither did his face or head or chest. You could see no marks at all of tire treads.

Q Did you see the truck they were driving in?

A Yes.

Q Was there any possibility to fall between the body and the back of the cab?

A No. The bed of the truck —

Q You saw no evidence of tire marks on the body and in your opinion it wouldn't have been

possible for him to fall under the back wheels if he jumped out?

A If he jumped it would have been utterly impossible for him to strike the rear wheel. That was my opinion anyway because the truck bed is quite high—I think it is about four feet from the ground to the bottom of the bed of the truck then it has a ten-inch high box on it and above that a piece of wood to extend the box up higher. He would have to jump at least eighteen inches to spring over to get away from it. By the time he hit the ground the truck would be by him.

Q Did you see any evidence of foul play?

A No.

QUESTION BY JURY: You think he went over the side of the truck?

A He had to go out the side of the truck. The position showed that the first marks were on the right hand side outside the travel of the cars.

Q You think he had been dragged?

A I know he had been dragged—he skidded along the road.

MR. AREND: He was dragged by his own force?

A After he hit the ground, he collapsed, turned over and slid. Mr. Berg, who was driving the truck at the time, is almost certain in his own mind that the dual tire went over him, but there is no evidence that we can see and we looked for that after we talked to Berg, and we couldn't see any marks of the tire.

Q Were any bones broken?

A We couldn't find any. Only the neck. I tried his right ankle, the one he hit the ground with. There was no crunching of the bones and no fracture that we could feel."

Dr. A. J. Schaible testified at the inquest that the deceased was in the neighborhood of six feet tall and was quite muscular (R. 31).

According to Ray Johnston, Earnest Nutt was standing on the floor of the truck when he jumped or stepped from the truck (R. 39). Because of the height of the sides of the truck body or dump box, according to Deputy Marshal Buckley (R. 36, 37), a person or object resting on the floor of the dump box of the truck would have to rise or be raised at least eighteen inches in order to clear the side of the dump box so as to leave the dump box in that manner. The road was smooth at the place where the death occurred, according to Walter Welchell (R. 27), and according to Jack Johnston (R. 49). The only other testimony regarding the condition of the road was given by Robert L. Nine by deposition, which is a part of the record herein (R. 83-98). In that deposition Mr. Nine testified that the road was wet and rutted, but at no point in the deposition does he state that these conditions existed at the point where the accident occurred; although it was five hours after the accident before Mr. Nine arrived at the scene of the accident, he nevertheless felt justified in volunteering his opinion "that as the truck rounded the curve it hit a chuck hole and the deceased was thrown out on the ground" (R. 95). However, in answer to Interrogatory 34 in his deposition Mr. Nine seems to have forgotten that opinion, because in answer to Interrogatory 34 he says that when he arrived at the scene of the accident the body was about 500 feet past the curve (R. 90). All of the testimony given on the point by witnesses

who were present at the time of the accident or who came up before the body had been moved fixed the point of the accident as about two hundred feet past the curve. Mr. Nine alone fixes the point at which the body came to rest at five hundred feet past the curve. It is proper to assume that his statement that the road was wet and rutted was made with reference to a point or area five hundred feet beyond the curve; his testimony is valueless in respect of the condition of the road two hundred feet beyond the curve, particularly in the light of the positive statements of the other witnesses that the road was smooth at the point where the accident occurred. Mr. Nine relinquishes all claim to credibility when he says that the deceased could have been thrown out of the truck as it rounded the curve so that the body would come to rest 500 feet beyond the curve.

The Commission has found as facts that one of the wheels struck either a hole in the road or an obstruction with such force as to "catapult" the muscular six-foot decedent, who was standing in the dump box of the truck, over the eighteen-inch high side of the truck, in a direction at right angles to the direction in which the truck was travelling, in such a manner that the decedent landed with both feet striking the road bed simultaneously (R. 101). This means obviously that the force of the bump was sufficiently great either (a) to throw the decedent straight up in the air from a standing position inside the truck until his feet were more than eighteen inches above the floor level, then to the right so as to clear the side of the truck body and the rear wheel, then downward to the ground so

as to permit the decedent to land with both feet striking simultaneously on the road bed on the right side of the road; or (b) to throw the decedent outward over the right side of the truck body and in such a manner as to permit him (a man six feet tall) to make a complete somersault in a space five feet above the ground so as to land with both feet striking the road bed simultaneously and with the direction of his fall still at right angles to the direction in which the truck was travelling.

Appellants submit that the foregoing analysis of the Commissioner's treatment of the question whether the deceased stepped or jumped from the truck or was bounced out of the truck shows that there was no substantial evidence before the Commissioner from which he could have made the finding which he did make on this question. The analysis seems also to show that the Commissioner regarded that one question as controlling and, as will be shown later in this brief, appellants respectfully submit that the District Court seems to have followed the Commissioner in that mistaken view.

Actually, of course, the findings of the Commissioner as affirmed by the District Court which appellants are attacking in this proceeding are the findings that the fatal injury arose out of and in the course of deceased's employment and was not due solely to the deceased's intoxication.

In order for these findings to be left undisturbed by this Court this Court must hold that the record before the Commissioner contained substantial evidence

from which the Commissioner could have made those findings.

In *Avignone Freres, Inc., v. Cardillo* (U.S.C.A. D.C. 1940) 117 F.(2d) 385, the court said:

“Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ ” (Citing *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L.ed. 126)

Avignone Freres, Inc., v. Cardillo, 117 F. (2d) 385, 386.

What relevant evidence is there in this record which could be accepted by a reasonable mind as adequate to support those findings of the Commissioner in this case?

In order for the Commissioner to find that the death of William Earnest Nutt arose out of and in the course of his employment it was necessary for the Commissioner to find that the death of William Earnest Nutt resulted from a peril or risk involved in or incidental to his employment or to the conditions under which his employment was required to be performed.

Specifically what was the risk or peril to which the deceased was exposed and because of which he met his death? It was the persistence of the deceased in standing up in the body of the truck after he had been warned of the danger of doing so (R. 39, 52) and his act of stepping out of the truck (R. 39). Clearly, neither his employment directly nor his employment indirectly through the incident of his transporta-

tion exposed him to any such peril. Up to the time the deceased stood up in the truck the deceased was seated in complete safety in the truck with his back toward the cab (R. 34, 38, 52). The case would be somewhat different if the truck in which he was being transported had been so crowded as to require him to stand, although it would be difficult even then to find evidence in this record which would reasonably justify an inference that the slight jolt or bump to which Otto Berg testified could have thrown the deceased from the truck in the manner in which he did leave the truck.

Ray Johnston (R. 40) and Jack Johnston (R. 48), who were riding in the dump box of the truck with the deceased, stated that they felt no jolt or jar or bump, that they felt "nothing"; Brown said that just before the truck stopped there was a sort of bump or jar and that he could not associate the jolt with anything and that he could not say that it was a bump in the road (R. 52, 53); Berg, who was driving, said he stopped the truck because he knew something had happened, that there was a jolt or a bounce, that what it was he didn't know, that it was like the truck made a jolt like it had run over a rock (R. 44); Welchell testified that he felt a jar in the truck and thought the truck must have hit something or bumped under the hind wheel (R. 27); Deputy Marshal Buckley thought that the jar was explained by the spring from the bottom of the truck which deceased must have made in order to clear the side of the truck (R. 36); Ray Johnston jumped from the truck immediately after the deceased left the truck so that the departure of the two men

must certainly have so lightened the load in the truck as to be noticeable to those in the cab (R. 40).

It simply is not reasonable to believe that the jolt or jar described by the men who were in the cab of the truck and which was not felt at all by the Johnston brothers, who were in the body of the truck, could have been of sufficient force so as to throw the six-foot muscular (R. 31) deceased from a standing position on the floor of the truck over the right side of the truck and at right angles to the direction in which the truck was travelling so as to cause him to strike the road in the manner in which the Commissioner finds he did strike the road. Appellants regard the finding that deceased was catapulted over the side of the truck because one wheel struck a hole or obstruction as unreasonable and as not being supported by any substantial evidence because it involves a rejection of a physical law—assuming that the deceased did not step or jump from the truck but was standing in the truck (R. 101), it is submitted that no ordinary jolt or jar resulting from one of the wheels striking either a hole in the road or an obstruction could have thrown the deceased over the side of the truck at right angles to the line of travel so that he would land on both feet simultaneously *and then slide forward* (in the direction of travel of the truck) twenty feet; whereas, it is not only a reasonable but practically a necessary conclusion that if the deceased jumped or stepped from the truck as Ray Johnston, the only eye witness, says he did, he would land on both feet and would then fall and slide forward in the direction in which the

truck was travelling, just as a person leaving a moving street car or train would do.

It is notable that all of the physical facts which appear in this record regarding the position and condition of the deceased's body after the accident confirm and verify the testimony of Ray Johnston and are at odds with the findings of the Commissioner.

Appellants call particular attention to the oral decision of Judge Bowen which is set forth on pages 111, 112 and 113 of the Record. Judge Bowen's views on the merits are set forth in two paragraphs of that decision.

"I do not hesitate to say that I feel that the Deputy Commissioner made a mistake in arriving at the decision and conclusions announced by him, but I am unable to say that as a matter of law there is no substantial evidence to support the action of the Deputy Commissioner. On the contrary, I am inclined to think there is some substantial evidence to support the Deputy Commissioner, notably the testimony of witness Berg, the truck driver, that he felt a jarring of the truck at the time of the accident, and for that reason it seems to me under the statute this Court is without authority to change the result arrived at by the Deputy Commissioner.

"I repeat, however, that I think the Commissioner made a mistake. I think in view of the testimony of Ray Johnston as to what took place in respect to those things connected with the accident, that the more direct and positive proof in this case is more convincing that the decedent, while in a partially intoxicated condition and in a spirit of playfulness or bravado or acting under

alcoholic stimulant, stepped out of that truck, himself, and that he was not thrown out of the truck by any jarring of the truck caused by rough roads. That is what I think about it, but I assume from the statute that my thought in the matter is of no concern in view of the fact that this Court cannot hold as a matter of law that there is no substantial evidence to support the Deputy Commissioner's action."

While it is interesting to note that the District Court recognized the difficulty of agreeing with the Commissioner in respect of the Commissioner's finding that the deceased was catapulted over the side of the truck by any jolt or jar, it is more important to note that both the Deputy Commissioner and the District Court failed to deal with one of the two controlling questions raised in this controversy.

The compensation order award of compensation (R. 99) and the District Court's oral decision (R. 111, 112, 113) contained no language indicating that any consideration was given to the question whether the death resulted from exposure to a peril involved in or incidental to the employment of the deceased or to the conditions under which that employment was required to be performed.

The District Court's decision is also silent in respect of the question whether or not the death was due solely to intoxication of the deceased.

Let us assume, without conceding, that the District Court was correct in holding that the record before the Deputy Commissioner did contain some substantial evidence in support of the Deputy Commissioner's finding that a jolt or bump occurred which was of

sufficient violence to catapult the deceased over the side of the truck and onto the roadway. It is the position of the appellants that such a holding, even if correct, could not by itself justify the District Court's decision that the Deputy Commissioner's compensation order award of compensation of July 3, 1945, was in accordance with law; it was necessary for the District Court first to find that the record before the Deputy Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and further that the same record failed affirmatively to establish that the death of William Earnest Nutt was occasioned solely by his intoxication. If the District Court could not make *both* of these findings, the District Court could not correctly hold that the compensation order award of compensation was in accordance with law.

Appellants submit that both the Deputy Commissioner and the District Court failed to recognize (a) that it was William Earnest Nutt's departure from the course of his employment in standing in the truck and in indulging in the conduct which this record clearly discloses which alone placed him in a position of peril and (b) that it is unreasonable to believe that William Earnest Nutt would have so conducted himself if he were not in an intoxicated condition.

Appellants hasten to point out that it was not necessary for the District Court and it is not necessary for this court to hold with appellants on both of these propositions. If appellants are correct in asserting that the peril to which William Earnest Nutt exposed himself as a result of which he died was a peril cre-

ated by his own departure from the course of his employment or was a peril which was not incidental to his employment or the conditions under which his employment was to be performed, then the decision of this case should be in favor of appellants regardless of the finding which the court may make in respect of the question of intoxication.

An injury cannot be said to arise out of the employment unless it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed; the fact that the injury is contemporaneous or coincident with employment is not alone a sufficient basis for an award.

Fazio v. Cardillo (U.S.C.A. D.C.) 109 F. (2d) 835, 836.

Assuming that William Earnest Nutt was in the course of his employment when he left Rika's roadhouse in appellants' truck (R. 100, 101) it would seem logical, if not inevitable, that this inquiry should proceed to a determination of the question whether his transportation in that truck exposed him to a risk or peril which caused his death.

Six men, including the driver, were riding in the truck; three of them, including the deceased, were riding in the back or truck body. Exclusive of the deceased no one was injured. That fact is important because it directs attention to the question why, of at least three men exposed to exactly the same risk, was only one injured?

The answer to that question is, of course, that the risk, if any, to which the transportation itself exposed these men did not cause deceased's injuries. The central fact from which flowed the tragic consequences giving rise to this controversy is the fact of deceased's intoxication. When the deceased persisted in standing in the body of the truck (testimony of Ray Johnston, R. 39; testimony of James F. Brown, R. 52), and when the deceased said, "Let's get out and walk" and stepped out of the moving truck (testimony of Ray Johnston, R. 39), he completely departed from the course of his employment and exposed himself to a grave peril which not only was not involved in or incidental to his employment but was the immediate and inevitable result of his departure from his employment.

In determining whether a servant's acts are for the purpose of serving the master or are such as to constitute a deviation from the course of his employment

"It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. The act is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master. However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined."

Restatement of Agency, Sec. 235.

In *Morgan v. Hoague* (App. D.C.) 72 F.(2d) 727, it is said:

"In order to determine whether the injury in this case arose 'in the course of' the deceased's employment, reference must be had to the time,

place, and circumstance under which the injury occurred."

Morgan v. Hoague (App. D.C.) 72 F.(2d) 727.

That the deviation from the course of the employment may be simultaneous with the casualty is clearly established by the decision of the Fifth Circuit Court of Appeals in *Hundley v. Hartford Accident Company*, 87 F.(2d) 416, in which case an oil company distributor bought an airplane which he intended to use both for his own pleasure and on company business. One Sunday morning he went out to the airport to endeavor to sell his company's gasoline to the manager. He entered the hangar where his plane was housed to watch two men polish his plane. He decided to help them, by using a mechanical buffer. While he was trying to clean this buffer with gasoline, it exploded, fatally burning him. *The court said that the deviation from his employment occurred when Hundley took hold of the buffer.*

The Restatement of Agency, Sec. 235, also contains this language:

"The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business."

Restatement of Agency, Sec. 235.

Application of these principles to the facts in this case is a simple and conclusive exercise. Assuming that deceased was in the course of his employment at the beginning of the ride during which he met his death, we find it established by this record that shortly before

he met his death he stood up in the truck while the truck was passing over rough road, and said "he saw a moose down there" and said, "lets go get it" (testimony of Ray Johnston (R. 39) ; testimony of James F. Brown (R. 52)). If there was nothing else in this record regarding the matter of deviation, it seems that any reasonable mind must conclude that when the deceased, who had ridden with complete safety for several miles while seated in the bed of the truck, stood up in the truck on a rough road, stated that there was a moose out there and invited his companions to join him in going to get it, he committed a complete deviation from the course of his employment, for the consequences of which the employer cannot fairly be held responsible. When to those facts is added the testimony of Ray Johnston that deceased voluntarily stepped out of the moving truck and the physical facts which have been accepted by the Commissioner as true, it seems to appellants that the conclusion must be inescapable that deceased's departure from the truck could not have occurred in the course of his employment.

The clear common sense of the situation disclosed by this record is that the deceased, who had only to remain seated in the truck in order to remain in the course of his employment as well as in complete safety, acted in the outrageous manner in which he did act simply and solely by reason of his intoxication which has been found as a fact by the Commissioner; that by reason of his stimulated condition he became oblivious to the danger of his situation and, ignoring it, acted in such a manner as to bring about his own death.

Assigned errors Nos. (3) and (4):

(3) The court erred in granting the motion of respondent C. M. Whipple to dismiss the libel of libellants herein; and in failing to deny said motion (R. 115, 116).

(4) The court erred in entering the order or final decree on November 21, 1945, granting said motion to dismiss and dismissing said libel (R. 116).

In support of their assignments of error (3) and (4) appellants adopt by reference their argument in support of their assignments of error (1) and (2).

It would seem necessarily to follow that if this court decides favorably to appellants the questions raised by appellants in either assigned error (1) or assigned error (2), this court must decide favorably to appellants the questions raised by assigned errors (3) and (4).

Respectfully submitted,

MERRITT, SUMMERS, BUCEY & STAFFORD,
MATTHEW STAFFORD

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Proctors for Appellants.

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

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CONSTRUCTION CO., an Iowa corporation, UNITED
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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE C. M. WHIPPLE

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BRIEF FOR APPELLEE C. M. WHIPPLE

STATEMENT OF THE CASE

While the bare facts alleged at the opening of appellants' statement of the case might create the impression that William Earnest Nutt, for whose death a claim of compensation was filed pursuant to statute, was at the time of his accidental death en-

gaged in a truck ride, not incidental to his employment, nevertheless this appellee does not desire to controvert any implication thereby created because he believes it unnecessary as the facts upon which appellants specify error seem sufficiently clear and such implication is not advanced by their argument.

QUESTIONS PRESENTED BY THE APPEAL

Is there sufficient evidence in the record, upon which the compensation award and order affirming same are based, to support the findings of the deputy commissioner (a) that the death of William Earnest Nutt arose out of and in the course of his employment, and (b) that the death of the deceased was not occasioned solely by his intoxication?

PERTINENT STATUTES

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U.S.C.A. 901 et seq), made applicable to persons employed at certain defense bases and under certain Public Works Contracts by the Act of August 16, 1941, as amended (55 Stat. 622, 42 U.S.C.A. 1651-1654), insofar as applicable to this appeal are as follows:

“Sec. 902—DEFINITIONS. WHEN USED IN THIS CHAPTER * * *

(2) The term ‘injury’ means accidental injury or death arising out of and in the course of employment. * * *”

“Sec. 903. COVERAGE. * * *

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.”

“Sec. 904. LIABILITY FOR COMPENSATION. * * *

(b) Compensation shall be payable irrespective of fault as a cause for the injury.”

“Sec. 919. PROCEDURE IN RESPECT OF CLAIMS. * * *

(a) * * *, the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claims.”

“Sec. 920. PRESUMPTIONS. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter. * * *

(c) That the injury was not occasioned solely by the intoxication of the injured employee. * *”

“Sec. 921. REVIEW OF COMPENSATION ORDERS. * * *

(b) If not in accordance with law, a compensa-

tion order may be suspended or set aside, in whole or in part, through injunction proceedings * * * instituted in the Federal district court * * *."

ARGUMENT

A. THE COMPENSATION LAW.

1. *Policy and Purpose.*

The law recognizes the human element involved in the employment of labor. As was said in *Hartford Accident & Indemnity Co. v. Cardillo* (App. D.C. 1940), 112 F. (2d) 11, certiorari denied, 310 U.S. 649, at page 15 of the Federal Reporter:

"The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (i.e., nonculpable, but injurious) behavior was not difficult. So with that of strangers, including assault by deranged persons, and their negligence intruding into the working environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and cama-

raderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. 'Old Man River' is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment. (And at page 17):

* * *

"(11) The limitation, of course, is that the accumulated pressures must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating entirely outside the working relation and not substantially magnified by it. Whether such influences have annulling effect upon those of the environment ordinarily is the crucial issue. The difference generally is as to the applicable standard. It is not, as is frequently assumed, the law of 'independent, intervening agency' applied in tort cases. It cannot be prescribed in meticulous detail, but is set forth in the statute, not only in the broad presumptions created in favor of compensability, but more explicitly in the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by the claimant. The provision is: 'No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by the *willful intention of the employee to injure or kill himself or another.*' (Italics supplied)"

Certainly lengthy court actions were not contemplated in the administration of the Act.

“ * * * the purpose of the Act was to expedite the hearing of claims and granting of awards and to simplify as greatly as possible the procedure in such matters, so that the needy, the helpless, and the ignorant would receive financial aid promptly. The Act gives to the commissioner broad powers to accomplish this purpose.”

South Chicago Coal & Dock Co. vs. Bassett, (C.C.A. 7, 1939), 104 F. (2d) 522, 526, affirmed 309 U.S. 251.

2. *Rules of Construction.*

It has been generally held that the compensation law is a “remedial statute” in the public interest and should be liberally construed so that the purpose of its enactment by Congress for relief of an injured employee or his dependent family may be effected and that any doubt should be resolved in their favor, if possible, so as to avoid incongruous or harsh results.

See *Hartford Accident & Indemnity Co. v. Cardillo*, *supra*; *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414.

3. *Review by Court Within Statutory Limitations.*

(a) *Scope*

The rights, remedies and procedure under the

Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the court are those only which are expressly conferred by the Act.

Associated Indemity Corp. v. Marshall, (C.C.A. 9, 1934), 71 F. (2d) 235.

It is solely within the province of the deputy commissioner to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability, and the Act does not contemplate hearing *de novo* before the court as to facts. *Wilson & Co. v. Locke* (C.C.A. 2, 1931), 50 F. (2d) 81.

The scope of review seems now further settled by the Supreme Court in *Norton v. Warner Co.*, 321 U.S. 565, 568, where the court expressed its view:

"Sec. 19(a) of the Act gives the Deputy Commissioner 'full power and authority to hear and determine all questions in respect of' claims for compensation. And Sec. 21(b) gives the federal district courts power to suspend or set aside, in whole or in part, compensation orders if 'not in accordance with law.' In considering those provisions of the Act in the *Bassett* case, we held that the District Court was not warranted in setting aside such an order because the court would weigh or appraise the evidence differently. The duty of the District Court, we said, was to give

the award effect, 'if there was evidence to support it.' 309 U.S. at 258. And we stated that the findings of the Deputy Commissioner were conclusive even though the evidence permitted conflicting inferences. *Id.* p. 260. And see *Parker v. Motor Boat Sales*, 314 U.S. 244, 246. This statement of the finality to be accorded findings of the Deputy Commissioner under the Act was not new. It had been stated in substantially similar terms in *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162, 166, and in *Del Vecchio v. Bowers*, 296 U.S. 280, 287. The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it. By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged. Thus it is that the judicial review conferred by Sec. 21 (b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act.

(b) *Burden of Proof and Presumptions.*

The employer and insurance carrier, on a libel to set aside a compensation order, have the burden of showing that there was not sufficient evidence before the Deputy Commissioner to support the order complained of in the bill. The findings of fact of the Deputy Commissioner are presumed to be correct.

Burley Welding Works v. Lawson (C.C.A. 5, 1944), 141 F. (2d) 964, 966.

B. FINDINGS OF DEPUTY COMMISSIONER SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. *That Death of Employee Arose Out of and in Course of Employment.*

Taking the foregoing elements in reverse order, attention is called to the testimony of A. A. Lyon, Engineer and Superintendent of the Lytle-Green Construction Company, who testified in part (R. 57-58) as follows:

Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?

A. On a Company truck to the place where they worked.

Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?

A. Yes, all within the area of activity in connection with the construction of the Big Delta Airport.

The testimony of William H. Green, foreman under whom the deceased worked on the day of his death, is to the same effect. (R. 67, 68, 73).

The testimony of Robert L. Nine, fellow-employee, is of similar effect as to the foregoing answers (R. 85, 86), and in addition, he testified:

Int. 15. On the day William Earnest Nutt was killed, did you go to the place of work where he was working with him, and if so, about what time of day did you go and what method of transportation did you use?

A. Yes, I went with him. We left the camp at 1:00 P. M. by truck.

Int. 16. Did one of your employers' trucks transport you from the camp to the place where that work was done that William Earnest Nutt and you and the others were doing on the afternoon of the day he was killed? A. Yes.

Int. 17 What kind of a day was it in reference to weather and what kind of a road was there between the camp and the place where you and William Earnest Nutt and the others were working?

A. Rainy day and the road was rough.

Int. 18. What were you and William Earnest Nutt and the others with you working at for your employer on the afternoon of the day William Earnest Nutt was killed?

A. We were loading electrical equipment on a barge.

Int. 19. How long did you and William Earnest Nutt work that afternoon or that day?

A. That afternoon we worked about five (5) hours.

Int. 20. What did you and William Earnest Nutt and the others do after your work was completed, and where did you go?

A. It was raining and we got wet so we went to Rika Wallen's roadhouse to dry out.

Int. 21. If you went to Rika's roadhouse, where was that in reference to the place where you and William Earnest Nutt were working, and did William Earnest Nutt also go to the same place?

A. Rika's roadhouse was about 500 feet from where we were working. Mr. Nutt also went there.

Int. 22. About what time of day did you go to that place? A. About 6:00 P. M.

Int. 23. State, if you know, whether or not the foreman over William Earnest Nutt and yourself, Mr. W. B. Green, was an employee of the same employer employing you and William Earnest Nutt on that afternoon, and also state, if you know, what the name of that employer was.

A. Yes, employer of all was Lytle & Green Construction Co.

Int. 24. State, if you know, whether William Earnest Nutt was instructed by W. B. Green as to how he was to return to the camp, and

state whether there was any conversation in your presence in reference to returning to the camp between W. B. Green and William Earnest Nutt or any others, and state what that conversation was.

- A. Yes. There were two trucks and Mr. Green told the ones that wanted to go on the first truck to do so, or take the second truck later. I did not hear any direct conversation between Mr. Green and Mr. Nutt. Mr. Green addressed the group of employees as a whole and left it up to us as to which truck to take back to camp.

DID THE INJURY RESULTING IN DEATH ARISE OUT OF THE EMPLOYMENT?

Harold William Johnston, who was riding in the back end of the truck with his brother Ray and the deceased, testified, in part (R. 48, 49), as follows:

- Q. Did you feel anything strike the car, or the car strike anything?
- A. No. The road was so rough.
- Q. What made the driver stop?
- A. He said he noticed it, but being in the back and we weren't watching the road like the driver was.
- Q. How fast do you think you were going?
- A. Not over 20 miles an hour I would say. 20 or 25 at the most.
- Q. Was the road rough?

A. Not in that particular spot.

Q. Did the accident happen on a curve or a straight of way?

A. We were just around the curve. There is a little straight stretch, about 200 yards.

Otto Berg, the driver of the truck, stated in his testimony (R 44):

Q. How did you know there had been an accident?

A. That's the thing. I stopped that truck because I knew something happened. There was a jolt or a bounce or whatever you want to describe it as. Something — what it was I don't know. Something had to call my attention that something had gone wrong. It was just like the truck made a jolt like it had run over a rock and that's what called my attention to stopping the truck and of course I stopped it right there. It flashed through and I wondered if something was wrong. I watch my road pretty close.

James F. Brown and Walter Welchell, riding in the seat of the truck with Berg, each testified that he felt a jolt or bump at the time of the accident (R. 27, 52).

In considering the question of compensability of injuries incurred by an employee while on his way to or from his work, it might be well to briefly re-

view that aspect of compensation law.

In the beginning, when compensation laws were first enacted, the courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The courts, however, were not long in recognizing that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment.

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment. A brief review of recent cases involving that question

will indicate the circumstances and factors which the courts have considered important.

In the case of *Southern States Mfg. Co. v. Wright*, 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

“Generally it appears that the employer’s liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.

“ * * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there*, arranged for the transportation of the employee on the employer’s truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was *an incident to the employment and was exercised in the furtherance of the employment.*” (Italic supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.*, 18 Atl (2d) 400, 127 Conn. 528 (1941),

the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck in which to ride home. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The court in affirming the award of compensation, said:

“An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work*; to do this it is not necessary that the employer should authorize the use of a particular means or method, although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment*, particularly where it is of benefit to him in furthering that employment.” (Italics supplied.)

In the case of *Chrysler v. Blue Arrow Transportation Lines*, 295 Mich. 606, 295 N. W. 331 (1940), the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the com-

pany. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The court, affirming the award to the employee, stated:

“Solution of the problem in the present case is aided by the test suggested in the Knopka case, ‘whether under the contract of employment, *construed in the light of all the attendant circumstances*, there is either an express or implied undertaking by the employer to provide the transportation.’

“In the case before us there was a clear undertaking on the part of the employer to furnish weekend transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town. (Italics supplied.)

In the case of *Rubeo v. Arthur McMullen Co.*, 193 Atl, 797 (N.J. 1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that

the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the court said:

“When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, was *plainly within the contemplation of the parties*, at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction of the employer, into a practice *grounded in mutual convenience and advantage*. The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term ‘employment.’ *The requisite relation of master and servant continued during the journey: and the hazards thereof are therefore regarded as reasonably incident to the service bargained for.*” (Italics supplied.)

In the case of *Lamm v. Silver Falls Timber Co.*, 286 Pac. 527 (Oregon 1930), an employee of the lum-

ber company was injured while returning to camp from town where he had gone over the weekend. In deciding that the employee's injury came within the provisions of the workmen's compensation law the court said:

"From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ. His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously.

* * *

"We come now to the more specific question whether the injury arose out of and in the course of the employment. This Court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions. * * *

"One of the purposes of the Workmen's Compen-

sation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. *Stark v. State Industrial Accident Commission*, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in *Wirta v. North Butte Mining Co.*, 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964; 'The word "employment" as used in the Workmen's Compensation Act does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * *

"Since employment is construed in its popular

signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * *

“A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen’s Compensation Acts is to grant compensation to an injured workman on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. *When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation.* The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words ‘accident arising out of and in the course of his employment,’ but bore in mind this general purpose of the act, as revealed by its entire text.” (Italics supplied.)

In the case of *Ohmen v. Adams Bros.*, 109 Conn. 378, 146 Atl. 825, the court aptly indicated the conditions under which an employee is covered under the compensation law as follows:

“We have held that an injury to an employee is said to arise in the course of his employment at a place where he may reasonably be, and while he is fulfilling the duties of his employment, or

engaged in doing something incidental to it, or something which he is permitted by the employer to do for their mutual convenience. * * *

“We have also held: ‘An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on.’ ”

In the instant case the employer furnished the employees with transportation to and from jobs that were not within walking distance. There was no means of transportation in the vicinity other than by the employer's trucks. The transportation of the men to and from the jobs was an incident of the employment. If employees are within the protection of the compensation act while they are being transported by their employer between their homes and the place of work before or after the regular working hours, then *a priori* they are protected while they are being transported to and from the various job sites in the course of the employment. The present case is within the purview of the compensation law for the reason that the accident occurred while the employee was being transported in his employer's truck from the place where he had performed work to the camp fur-

nished by the employer. The transportation was an *incident* (or even a necessity) of the employment. While riding the truck he was as much in the course of his employment as though performing his manual labor. Even if one reading the testimony should conclude that the employee in some manner (through joviality, carelessness or similar conduct) contributed to the fall through his own *fault, negligence, or contributory negligence*, the claim is not barred. The statute takes care of this.

Appellants would substitute their scientific conclusion as to the impossibility of the deceased falling out of the truck and landing as described for the findings of the deputy commissioner (Brf. 24). However, appellants in their analysis do not consider the effect of the truck motion in rounding a curve (R. 49) or the loss of his equilibrium by the deceased while standing in the bed of the truck. It is possible the road was smooth at the place where the deceased landed and yet there is substantial evidence that it was rutty and rough (R. 39, 48). Since appellants defend upon the testimony of Ray Johnston, the only eye-witness to the departure of the deceased from the truck, his viewpoint should be considered to determine whether his fall was accidental, wilful or solely because of intoxication.

Ray Johnston testified (R. 11) that he (Nutt) raised up a foot as if to step out; that he had just before (R. 12) pushed him back and said "These are rough roads. You'll fall out; and didn't think anything more of it." In answer to question as to any reason for deceased so acting (R. 12) Ray Johnston answered: "No. Any more than just joking."

Questioned by the Jury (R. 13) he answered: "I don't think he figured on letting his foot go down there that far."

Appellee submits that if there is an inference to be drawn from all the testimony it is not the conclusion reached by appellants of departure from course of employment due to intoxicated condition (R. 27), but that deceased was a well being, who had indulged in beer and was in a joking mood and in his pranks he was caught off balance by the motion of the truck in which he was standing and when he put his foot out to brace himself instead of touching the side of the bed his foot went over the 10-12 inch top.

However, it should be reiterated that even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be re-weighed.

Norton v. Warner Co., supra; South Chicago Coal

& Dock Co. v. Bassett, 309 U. S. 251; *Parker v. Motor Boat Sales*, 314 U. S. 244; *Liberty Mutual Ins. Co. v. Gray* (C.C.A. 9, 1943), 137 F. (2d) 926; *Lowe v. Central R. Co. of New Jersey* (C.C.A. 3, 1940) 113 F. (2d) 413; *Henderson v. Pate Stevedoring Co., Inc.* (C.C.A. 5, 1943), 134 F. (2d) 440.

Appellants contend that if deceased had remained seated instead of standing up, the accident would not have occurred. The statute seems to have answered this contention by setting up two defenses only: That injury (1) is due solely to intoxication; and (2) is due solely to the willful intention of the employe to injure or kill himself or another.

It will be noted the second ground was not urged and the first ground was not found. (Sec. 903 (b)).

The statute further fortifies the position of claimant in that "compensation shall be payable irrespective of fault as the cause for the injury." (Sec. 904 (b)).

Fault or contributory negligence or negligence have consistently been rejected as defenses to claims; otherwise the statute would not remedy as it was enacted to do, the assumptions of the common law doctrine.

See *Hartford Accident & Indemnity Co. v. Cardillo, supra.*

2. *That Death of Employee was not Occasioned Solely by his Intoxication.*

The deputy commissioner found "that deceased was in a happy state of intoxication." He perhaps qualified his statement because reference to the testimony will show that no witness testified that deceased was intoxicated at the time of the accident. To say that the accident was due solely to intoxication is to say if deceased had been sober it could not have happened.

Appellants would attempt to argue that the "outrageous manner" in which the deceased acted was solely due to intoxication, and the riding in a bouncing truck over a rough crooked road could not be considered in any sense a related cause because others who were equally intoxicated, according to the testimony (R. 28, 40, 43, 48,), remained seated and were uninjured, and, therefore, his death was caused by his own careless conduct.

As appellee has heretofore pointed out, this conclusion was not justified by the testimony of Ray Johnston, or any other person, nor by the disclosed life and habits of the deceased. Furthermore, in view

of the presumption (38 U.S.C.A. Sec. 920 (c)) the burden was upon the employer and carrier to establish that decedent's death was occasioned solely by his intoxication.

The courts have uniformly affirmed a finding of the trier of the facts that the injury did not result solely from the intoxication of the employee where other contributing factors existed.

Department of Taxation & Finance v. De Parma, 3 N.Y.S. (2d) 120; *Southern Can Co. v. Sachs*, 131 Atl. 760; *Hahneman Hospital v. Industrial Board of Illinois*, 118 N.E. 767; *Griffiths & Sprague Stevedoring Co. v. Marshall*, 56 F. (2d) 665; *Maryland Casualty Co. v. Cardillo*, (App. D.C., 1939), 107 F. (2d) 959.

The Supreme Court of Arkansas, in *Elm Springs Canning Co. v. Sullins*, 180 S.W. (2d), 113, 116, a case also involving intoxication and falling from a truck under circumstances that in a fair and impartial mind would remain in doubt, gave the deceased the benefit of the doubt, in the following words:

“To assume that his intoxication was the sole cause of his falling from the truck and resultant death would be a presumption in the teeth of a statutory presumption to the contrary.”

C. THE DISTRICT COURT'S AFFIRMANCE
OF ORDER OF AWARD WAS PROPER
AND SUFFICIENT.

Appellants contend (Brf. 26, 27) as follows:

"Let us assume, without conceding, that the District Court was correct in holding that the record before the Deputy Commissioner did contain some substantial evidence in support of the Deputy Commissioner's finding that a jolt or bump occurred which was of sufficient violence to catapult the deceased over the side of the truck and onto the roadway. It is the position of the appellants that such a holding, even if correct, could not by itself justify the District Court's decision that the Deputy Commissioner's compensation order award of compensation of July 3, 1945, was in accordance with law; it was necessary for the District Court first to find that the record before the Deputy Commissioner contained substantial evidence that the death of William Earnest Nutt arose out of and in the course of his employment, and further that the same record failed affirmatively to establish that the death of William Earnest Nutt was occasioned solely by his intoxication. If the District Court could not make *both* of these findings, the District Court could not correctly hold that the compensation order award of compensation was in accordance with law."

Previously (Brf. 21), appellants stated their case:

"Actually, of course, the findings of the Commissioner as affirmed by the District Court which appellants are attacking in this proceeding are the findings that the fatal injury arose out of and

in the course of deceased's employment and was not due solely to the deceased's intoxication."

It is the position of this appellee that the questions raised in this appeal are not jurisdictional, but questions of fact, and the only question of law involved here is whether there was sufficient evidence to support the findings of the Deputy Commissioner; also, that the District Court made its affirmance in accordance with the statute (Sec. 921 (b), 33, U.S. C.A.), and it was not proper for the court to make independent findings affirmatively confirming those made by the Deputy Commissioner. The statute determined when findings of the court would be proper and necessary and the courts have followed the statute.

See *Trudenich v. Marshall*, 34 F. Supp. 486; *Dansky v. Cardillo*, 40 F. Supp. 336; *Luckenbach S. S. Co. v. Norton*, 41 F. Supp. 105, 54 F. Supp 1; *Glen Falls Indemnity Co. v. Henderson*, 42 F. Supp. 528; *Merritt, Chapman & Scott Corp. v. Bassett*, 50 F. Supp. 488; *McCarthy Stevedoring Corp. v. Norton*, 46 F. Supp. 26; *Kellum v. Bethlehem Steel Corp.*, 49 F. Supp. 816; *F. H. McGraw v. Lowe*, 52 F. Supp. 641; *Lockheed Overseas Corp. v. Pillsbury*, 52 F. Supp. 997; *Watkins v. Parker*, 54 F. Supp. 95; *Tucker v. Norton*, 56 F. Supp. 61; *Marine Co. v.*

Monahan, 61 F. Supp. 647; *Wilson & Co. v. Locke*, *supra*; *Calabrese v. Locke*, 56 F. (2d) 458; *Southern S. S. Co. v. Norton* (C.C.A. 3, 1939), 101 F. (2d) 825; *Groom v. Cardillo* (App. D.C. 1941), 119 F. (2d) 697; *Case v. Pillsbury* (C.C.A. 9, 1945), 148 F. (2d), 392; *Contractors v. Pillsbury* (C.C.A. 9, 1945), 150 F. (2d), 310; *Contractors v. Marshall* (C.C.A. 9, 1945), 151 F. (2d), 1007; *Crowell v. Benson*, 285 (U. S. 22; *South Chicago Coal & Dock Co. v. Bassett*, *supra*; *Parker v. Motor Boat Sales*, *supra*; *Norton v. Warner Co.*, *supra*.

The motion to dismiss raises only a question of law, and neither the statute nor any rule of admiralty procedure requires that the court make and enter findings to support the order of affirmance granting the motion.

CONCLUSION

For the foregoing reasons it is appellee's contention the decision below should be affirmed.

Respectfully submitted,

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United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for C. M. Whipple,
Deputy Commissioner.

LEO M. KOENIGSBERG,
Attorney for Claimant

No. 11222

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-Mc-
CONE, S. A., a corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAY 1 1935

PAUL M. DOWEN,
CLERK

No. 11222

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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720 Security Building

Long Beach 2, California [1*]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. LB C-12284

DOYLE McDONALD,

Plaintiff,

vs.

BECHTEL-McCONE-PARSONS CORPORATION,
a corporation, COMPANIA CONSTRUCTORA
BECHTEL-McCONE-PARSONS S. A., a corpo-
ration, DOE ONE COMPANY, a corporation,
DOE TWO COMPANY, a co-partnership, DOE
THREE, DOE FOUR, and DOE FIVE,

Defendants.

COMPLAINT

(On Contract for Work and Labor)
and Certificate of Assignment and Transfer

The plaintiff complains of defendants and for cause of
action alleges:

I.

That defendant Bechtel-McCone-Parsons Corporation,
a corporation, is a Nevada corporation duly qualified to
and doing business in the State of California as a foreign
corporation with its principal place of business in the City
of Los Angeles, County of Los Angeles, State of Cali-
fornia.

II.

That defendant Bechtel-McCone-Parsons S. A., a cor-
poration, is a South American corporation doing busi-
ness in the State of California by and through its agent,
the defendant Bechtel-McCone-Parsons Corporation, a
corporation.

III.

Plaintiff is not informed as to the true names of the defendants Doe One Company, a corporation, Doe Two Company, a co-partnership, Doe Three, Doe Four and Doe Five, and whether they be corporations, associations or natural persons, and for that reason said defendants, and each of them, are sued under said names as fictitious names and when plaintiff ascertains the true names of said defendants he will ask leave of Court to amend [2] this complaint and all subsequent proceedings herein to show the true names of said defendants and their capacities.

IV.

That on the 4th day of April, 1944, the plaintiff and the defendants, and each of them, entered into a written contract, a copy of which is hereto annexed, and incorporated herein as though set forth at length. That under said contract plaintiff Doyle McDonald agreed to work for the defendants, and each of them, as a boilermaker in Awali, Bahrein Island, Persian Gulf. That the plaintiff was to receive a minimum monthly salary of Four Hundred Fifty Dollars (\$450.00) with overtime for all hours in excess of fifty-two (52) hours per week. That said contract provided for employment of plaintiff by the defendants, and each of them, for a period of eighteen (18) months from April 20th, 1944.

V.

That the plaintiff has, at all times, done and performed all of the stipulations, conditions and agreements stated in said contract to be performed on his part at the time and in the manner therein specified.

VI.

That the defendants, and each of them, have failed and refused and still refuse to perform the said contract on their side.

VII.

That by reason of the premises the plaintiff has been damaged in the sum of Four Thousand Fifteen Dollars (\$4015.00), no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of Four Thousand Fifteen Dollars (\$4015.00), for costs of suit, and for such other and further relief as to the Court seems just and proper in the premises.

RUSSELL H. PRAY

EDWARD W. SHERIDAN

By Russell H. Pray

Attorneys for Plaintiff [3]

Bah. D-4

JCB:ms

8-18-43

SALARY ALLOTMENT—BAHREIN EMPLOYEES

Bechtel-McCone-Parsons Corporation

Acting Under and Pursuant to Sub-Contract

With Companian Constructora Bechtel-McCone-Parsons S. A.

570 Mills Building

San Francisco, 4, California

Employee Doyle McDonald

Gentlemen:

Starting with salary payable on April 20th, 1944, and thereafter until terminated or amended by written notice,

you are hereby authorized to make the following allotment of all salary payments due the undersigned under his Temporary Employment Agreement with Bechtel-McCone-Parsons Corporation, dated April 4th, 1944, and Permanent Employment Agreement with Compania Constructora Bechtel-McCone-Parsons- S. A.

<u>Item No.</u>	<u>Monthly Deductions</u>	<u>Amount</u>
1	Field Allotment to be paid at Bahrein	\$50.00 per month
2

3	Balance of Earnings to be Deposited In Farmers & Merchants Bank, American Avenue Branch, located at 1401 American Avenue, Long Beach, California, to the credit of Savings Account Number 10335 of Doyle Mc- Donald.

You are authorized to reply to inquiries in connection with my salary only to

Very truly yours,

Doyle McDonald

Dated at Los Angeles, California, this 4th day of April, 1944. [4]

Approved:

Bechtel-McCone-Parsons Corporation
Acting under and Pursuant to Sub-
Contract with Compania Constructora
Bechtel-McCone-Parsons S. A.

By Wm. T. Dodson

Date April 4, 1944 [5]

Bah. D-5

JCB:ms

9/1/43

BECHTEL-McCONE-PARSONS CORPORATION

Engineers-Constructors

Mills Building, 220 Montgomery Street

San Francisco, 4, California

TEMPORARY EMPLOYMENT AGREEMENT

The undersigned, Bechtel-McCone-Parsons Corporation, has entered into a written agreement with Compania Construction Bechtel-McCone-Parsons S. A. to engage persons in the United States who will render services for the latter corporation which is the Construction Contractor under written agreement with The Bahrein Petroleum Company Limited to perform certain refinery construction work at Bahrein, Persian Gulf, and in the vicinity thereof.

It is understood that you are willing to enter into an employment agreement with said Construction Contractor to perform your services at Bahrein, Persian Gulf, and in the vicinity thereof, in accordance with the terms and conditions set forth in the attached contract.

Pursuant to the above mentioned agreement with Compania Constructora Bechtel-McCone-Parsons S. A. and contingent on your securing a passport and meeting our requirements of physical examination, we hereby engage you to proceed to Bahrein, Persian Gulf, at the salary and compensation, and upon the terms and conditions set forth in the attached contract, said salary hereunder to commence on the 20th day of April 1944. You are hereby assured that when you arrive at Bahrein,

Persian Gulf, the attached contract will be duly executed by said Construction Contractor, and you hereby agree to execute the attached contract upon arrival at Bahrein, Persian Gulf, and thereupon your employment hereunder shall terminate and your employment by said Construction Contractor shall commence in accordance with the attached contract. [6]

BECHTEL-McCONE-PARSONS CORPORATION
Acting Under and Pursuant to Sub-
Contract with Compania Constructora
Bechtel-McCone-Parsons S. A.

By: Wm. P. Dodson
Wm. T. Dodson
Ass't. Foreign Employment Manager

I Accept the Foregoing This 4th day of April, 1944.

Doyle McDonald

es [7]

COMPANIA CONSTRUCTOR _ BECHTEL-McCONE-
PARSONS S. A.

DOYLE McDONALD

EMPLOYMENT AGREEMENT

This Memorandum sets forth the terms, conditions, and privileges of the employment agreement between the above-named Company and Employee, as follows:

1. Term and Place of Service

Company hereby engages Employee and Employee hereby agrees to serve Company as a Boilermaker (or in such other capacity as Company may from time to time require) in Company's Zone of Operations for a period

of eighteen (18) months from the date Employee shall report for duty at Bahrein, Persian Gulf, Namely, As herein used "Zone of Operations" is understood to mean Bahrein, Persian Gulf, and any other locality around the Persian Gulf, to which Employee may be transferred for service.

2. Out Passage

Employee departed from Los Angeles, California, on April 24, 1944. Employee was furnished transportation from Los Angeles, California, hereinafter referred to as Employee's Home, to Bahrein, and a Travel Allowance in the sum of \$30.00) Thirty Dollars for which Employee shall render an Expense Account.

3. Salary

Company agrees, commencing on the 3rd day of May, 1944, to pay Employee a salary at the rate of Four Hundred Fifty Dollars (\$450.00) per month on the basis of 52 hours work per week. All work in excess of 52 hours per work week or in excess of 10 hours per day shall be considered overtime and payable on a straight time basis with the exception that said overtime provision will not apply to time spent in travel hereunder.

4. Meals and Sleeping Accommodation

While Employee is at Bahrein, Persian Gulf, Company shall furnish him free meals and sleeping accommodations through available facilities which Employee shall be required to accept and utilize. [8]

5. Industrial Injury

In the event Employee shall suffer injury (which term shall include occupational diseases and death proximately

caused by such injury) arising out of and in the course of employment hereunder, irrespective of negligence on the part of either the Employee or Company, Company shall voluntarily pay Employee or his dependents compensation as determined and measured by the standards of the Workmen's Compensation Act of the State of California, U. S. A. Such compensation shall be in lieu of any other liability of the company to the Employee or his dependents. Company is hereby subrogated, up *the* the amount of compensation paid, to any right of action or damages which Employee or his representative may have or recover in the future against or from any third party liable for an injury in consequence of which Company has paid compensation.

6. Conduct of Employee

Employee hereby undertakes and agrees: To comply with and abide by all general regulations and instructions from time to time issued by Company, or by The Bahrein Petroleum Company Limited, including those governing hours and conditions of work, and to obey all lawful orders given by the company, its Manager, or other duly authorized person or persons.

To conduct himself at all times in such a manner as not to bring discredit upon himself or Company and to abide by all laws of the country and locality in which he is working. Employee shall not engage, directly or indirectly, in any other employment, service or business whatever, nor shall he take part in local politics. Employee shall not, during the term of this Agreement or thereafter, impart any information relative to the business or affairs of the Company to anyone except to those employees of the Company who are entitled to receive such

information. If Employee shall absent himself from his work or duties without permission, he shall not be entitled to any wages or salary or to any allowance [9] whatsoever for such day or days of absence.

7. Inoculations and Vaccinations

Employee agrees to receive at his own risk and at the expense of the Company, and at the time and from the Doctor or Doctors designated by the Company, such inoculations, vaccinations and examinations as shall be specified by Company.

8. Marital Status

Employee hereby states that he is single.

~~married.~~

9. Termination by Company or Employee

(a) Either Company or Employee may terminate Employee's service hereunder at any time by giving one to the other previous written notice of intention so to do. The minimum period of said notice shall be one month.

(b) Alternatively at its discretion Company may terminate Employee's service hereunder at any time without previous notice upon payment to Employee of a sum of money equivalent to salary for the required period of notice.

10. Termination by Company for Cause.

Company may summarily terminate Employee's service hereunder at any time for Cause, such as insubordination, intemperance, use of narcotics, venereal disease, self-injury wilfully inflicted; non-compliance with Company's Regulations or instructions, dishonesty, misconduct, inefficiency, or if Company is requested to dismiss Em-

ployee by any Government official or by any representative of the client of the Company.

11. Employee's Departure

Upon completion or in the event of termination of Employee's service hereunder, it is understood that Employee must depart from the Zone of Operations on the date specified by the Company.

12. Return Passage

(a) Upon completion of Employee's full term of service [10] hereunder as defined in 1, or upon prior termination thereof by Company for any reason other than Cause, or by Employee during any extension of said term of service as provided for in Paragraph 16, Company shall pay all necessary expenses of Employee's passage to his home of the class and by the route designated by the Company and pay Employee up to date on which Employee would ordinarily reach his Home traveling by the said route or up to the date of termination, whichever date is the later.

(b) In the event that Employee's service hereunder shall be terminated by the Company for Cause during the Employee's full term of service hereunder as defined in 1, or during any extension of such term of employment as provided for in 16, or by Employee prior to full term of service hereunder as defined in 1, Company shall be under no obligation to pay, or to contribute in any manner to the expenses of the Employee's passage to his Home nor to pay Employee any salary for the time consumed in returning thereto or for any other period beyond the date of such termination. Company may, at its discretion, purchase for Employee, at Employee's expense, tickets or vouchers good for Employee's return passage or any

portion thereof, and Company is hereby authorized to withhold and retain from any sums due from Company to Employee the amount necessary to cover the cost of any tickets or vouchers so purchased.

13. Inability to Perform

If Employee, for any reason, shall be or become unable to perform or shall be prevented from performing the services herein contracted for, the Employer shall have no obligation to continue payment of the salary or compensation, and expense allowance, or any part thereof as herein provided, except only in case of brief illness, or brief disability due to accident.

14. Currency and Exchange

Any amounts which may become due Employee from Company and [11] are authorized to be paid to Employee at Bahrein or which may become due Company from Employee shall be paid at the rate of exchange and in the currency that Company considers fair and equitable. Company will deposit to Employee's account in dollars in the United States such portion of Employee's salary as Employee directs in advance; provided Company shall not be liable after placing a check for the amount specified by Employee in an envelope duly stamped and addressed to the person or account specified by Employee and placing such envelope in the regular mails.

15. Inventions and Patents.

Company shall be entitled to the sole benefit and exclusive ownership of any inventions or improvements in plant, machinery, processes or other things used in the business of the Company which may be made or discovered by Employee while he is in the service of Company

and all patents for the same, and Employee shall do all acts necessary or required by Company to give effect to this paragraph.

16. Extension of Agreement

If, upon the request or with the consent of Company, Employee continues in this employment beyond the period described in Paragraph 1, this Agreement shall remain in effect during continuance of such service.

17. Burial Release

Employee hereby authorizes and directs Employer, in the event of death of said Employee while outside of the United States and during the term of this contract, to make such disposition as seems best under the circumstances prevailing at the time, of the person and personal effects of said Employee.

18. Limitation of Terms

This contract embodies the whole agreement between the parties hereto and there are no inducements, promises, terms, conditions or obligations made or entered into by the Employer than *than* contained herein. [12]

19. Home Address

Employee hereby authorizes and directs Employer in the event of accident or emergency to notify Mrs. Myrtle McDonald (mother) at General Delivery, Joplin, Missouri. This address may be considered Employee's permanent home address, or the address of the person with whom Employer may communicate concerning personal matters relating to Employee. Employee hereby authorizes and directs Employer to.....

The foregoing provisions are understood and agreed to by the undersigned.

Doyle McDonald
Co. CONST. BECHTEL-McCONE-
PARSONS S. A.
By J. R. McAuliffe

Date and Place of Signing.

Bahrein Island

May 28, 1944

es. [13]

[Verified.] [14]

[Title of Superior Court and Cause.]

CERTIFICATE FOR ASSIGNMENT AND TRANSFER

This is to certify that the above entitled action is entitled to be transferred to the Long Beach, Department of the Superior Court of Los Angeles County, as provided in Section Two, Subdivision "B", Rule 30 of this Court, for the following reason: The action, or some part thereof, arose within the territory of the Long Beach Department.

DOYLE McDONALD

Plaintiff

[Verified.]

[Endorsed]: Filed Apr. 13, 1945, L. B. Superior Court. [15]

[Title of Superior Court and Cause.]

NOTICE OF FILING OF PETITION AND BOND
FOR REMOVAL TO UNITED STATES DIS-
TRICT COURT

To Doyle McDonald, plaintiff above named, and to Rus-
sell H. Pray and Edward W. Sheridan, his attorneys:

Please Take Notice that on Tuesday May 15, 1945, at
the hour of 2:45 o'clock P. M., or as soon thereafter as
counsel may be heard, Bechtel-McCone Corporation, a
corporation (sued herein as Bechtel-McCone-Parsons Cor-
poration, a corporation) will present to the above entitled
court in Long Beach, Department C thereof, located in
the Jergins Trust Building, 100 East Ocean Boulevard,
Long Beach, California, its petition and bond, true copies
of which are hereunto attached, for removal of the
above [16] entitled action to the District Court of the
United States for the Southern District of California,
Central Division, and that said defendant will at said
time and place apply for an order removing said cause
to said District Court in form as per copy hereunto at-
tached and

You Will Also Further Please Take Notice that said
defendant Bechtel-McCone Corporation will immediately
thereafter file said petition and bond with the clerk of the
above entitled court.

Dated: May 15, 1945.

O'MELVENY & MYERS,
By Leo A. Deegan
JACKSON W. CHANCE,

Attorneys for Defendant Bechtel-McCone Corporation,
a corporation.

[Note: The Petition and Bond attached to this Notice of Filing are the same as the Petition for Removal of Cause to United States District Court for the Southern District of California. Central Division, and Bond, appearing at pages 16 and 21 respectively of the Transcript of Record so are not repeated at this point.]

[Endorsed]: Filed May 15, 1945. L. B. Superior Court. [17]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, CENTRAL DIVISION

The verified petition of Bechtel-McCone Corporation, a corporation (sued herein as Bechtel-McCone-Parsons Corporation, a corporation), one of the defendants in the above entitled action, respectively shows:

1. Plaintiff was at the time of the commencement of the above entitled action and now is a citizen and resident of the State of California.

2. Defendant and petitioner Bechtel-McCone Corporation was at the time of the commencement of the above entitled action and now is a corporation duly organized and existing under the laws of the State of Nevada and was at said time and now is a [18] citizen and resident of the State of Nevada. At the time of the execution of the contracts sued upon in the above entitled action the correct corporate name of petitioner was Bechtel-McCone-Parsons Corporation. Subsequent to the execution

of said contracts and prior to the commencement of the above entitled action petitioner's corporate name was changed to Bechtel-McCone Corporation.

3. Defendant Compania Constructora Bechtel-McCone, S. A. (sued herein as Compania Constructora Bechtel-McCone-Parsons, S. A., a corporation) was at the time of the commencement of the above entitled action and now is a corporation duly organized and existing under the laws of the Republic of Venezuela and was at said time and now is a citizen and resident of the Republic of Venezuela. At the time of the commencement of the above entitled action Compania Constructora Bechtel-McCone-Parsons, S. A., was the true corporate name of the defendant sued herein under that name. Since the execution of said contracts and prior to the filing of the above entitled action said defendant has changed its corporate name to Compania Constructora Bechtel-McCone, S. A.

4. Defendants Doe One Company, a corporation, Doe Two Company, a co-partnership, Doe Three, Doe Four and Doe Five are purely fictitious defendants having no real existence. It affirmatively appears from the face of the complaint on file herein that no cause of action is stated against said fictitious defendants, that there are no persons other than petitioner and defendant Compania Constructora Bechtel-McCone, S. A., necessary or proper to be joined as defendants in order to grant complete relief and that there are no persons other than plaintiff and petitioner and said Compania Constructora Bechtel-McCone, S. A., [19] having any relationship to or interest in the purported cause of action sued upon.

5. The above entitled action was commenced on April 13, 1945 in the Superior Court of the State of California in and for the County of Los Angeles and involves a controversy between plaintiff, who is a citizen and resident of the State of California, on one side, and petitioner, which is a citizen and resident of the State of Nevada and defendant *Compania Constructora Bechtel-McCone, S. A.*, which is a citizen and resident of the Republic of Venezuela, on the other side. By the complaint in said action plaintiff seeks recovery of the sum of \$4,015 as damages for the alleged breach of an employment contract. The matter in controversy in said action exceeds the sum of \$3,000, exclusive of interest and costs.

6. The time for petitioner as defendant in said action to appear, answer or otherwise plead to plaintiff's complaint therein has not expired. The summons and complaint in said action was served on petitioner in the City and County of San Francisco, State of California, on April 18, 1945, and the time within which said petitioner as such defendant is required to appear, answer or otherwise plead to plaintiff's complaint will not expire until and including May 18, 1945.

7. Summons and complaint in said action has not been served upon defendant *Compania Constructora Bechtel-McCone, S. A.*, a corporation. Said defendant is not doing and never has done business in the State of California.

8. Petitioner presents a good and sufficient bond as provided by statute in such cases, which bond is in the penal sum of \$1,000 and is conditioned upon the entry

in the District Court of the United States for the Southern District of California, Central Division, within 30 days of the filing of this petition of a certified copy of the record in the above entitled action and of the payment of all costs which may be awarded by said court if the court shall hold said action improperly removed thereto.

Wherefore, petitioner prays that this court make and enter its order

1. Approving the bond present herewith;
2. Removing the above entitled cause to the District Court of the United States for the Southern District of California, Central Division;
3. Directing that a transcript of the record herein be prepared by the Clerk of this Court to be filed with said District Court of the United States in manner and form as provided by law in such cases; and
4. Providing that all further proceedings in this case be stayed.

Dated: May 12th, 1945.

BECHTEL-McCONE CORPORATION

By J. D. Trimmell

Petitioner.

O'MELVENY & MYERS

By Jackson W. Chance

Attorneys for Petitioner [21]

JOINDER IN PETITION

Compania Constructora Bechtel-McCone, S. A., a corporation, duly organized and existing under and by virtue of the laws of the Republic of Venezuela, and a citizen and resident of said Republic of Venezuela, one of the defendants in the above-entitled action (sued therein as Compania Constructora Bechtel-McCone-Parsons, S. A.) joins in the foregoing petition of Bechtel-McCone Corporation, a corporation, and consents to and joins in the petitioner's prayer therein.

COMPANIA CONSTRUCTORA BECHTEL-
McCONE, S. A., a corporation

By O'MELVENY & MYERS

and

JACKSON W. CHANCE

Its Attorneys [22]

[Verified.] [23]

[Endorsed]: Filed May 15, 1945, Long Beach. [24]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents:

That the National Surety Corporation, a corporation, as Surety, is held and firmly bound unto Doyle McDonald, plaintiff in the above entitled action, his legal representatives, successors and assigns, in the sum of one thousand dollars (\$1,000) lawful money of the United States of America, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such That:

Whereas, Bechtel-McCone Corporation, a corporation, one of the defendants in the above entitled action (sued therein as Bechtel-McCone-Parsons Corporation, a corporation) has filed, or is about to file its petition in the Superior Court of the State of California in and for the County of Los Angeles, for the removal of the above entitled action therein pending, to the United States District for the Southern District of California, Central Division, and Compania Constructora Bechtel-McCone, S. A., a corporation, (sued therein as Compania Constructora Bechtel-McCone-Parsons, S. A., a corporation), has joined in said petition for removal;

Now, Therefore, if Bechtel-McCone Corporation, a corporation- [25] tion, one of the defendants above named, shall within thirty (30) days from and after the date of the filing of said petition enter in said District Court of the United States of America a duly certified copy of the record in the above entitled action, and shall pay or cause

to be paid all costs that may be awarded therein by the District Court of the United States if such Court shall hold that such action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Dated this 14th day of May, A. D. 1945.

(Seal) NATIONAL SURETY CORPORATION

By H. Everett Charlton

Attorney-in-Fact

The premium charged for this bond is \$10.00 for the term thereof.

The foregoing bond on removal is hereby approved as to form and sufficiency of Surety, this 15th day of May, 1945.

H. C. SHEPHERD

Court Commissioner of Los Angeles County

State of California, County of Los Angeles—ss.

On this 14th day of May in the year one thousand nine hundred and 45, before me Elsie M. Radoy, a Notary Public in and for said County and State, residing therein duly commissioned and sworn, personally appeared H. Everett Charlton, known to me to be the duly authorized attorney in fact of National Surety Corporation, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Corporation, and the said H. Everett Charlton acknowledged to me that he subscribed the name of National Surety Corporation thereto as principal, and his own name as Attorney in Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first [25-A] above written.

(Seal)

ELSIE M. RADOY

Notary Public in and for said County and State.

My Commission Expires August 26, 1946.

[Endorsed]: Filed May 15, 1945, Long Beach. [25-B]

[Title of Superior Court and Cause.]

ORDER REMOVING CAUSE TO UNITED STATES DISTRICT COURT

This cause came on for hearing upon the petition of defendant Bechtel-McCone Corporation, a corporation, consented to and joined in by defendant Compania Constructora Bechtel-McCone, S. A., a corporation, for an order removing this cause to the District Court of the United States for the Southern District of California, Central Division, and it appearing to this court that said defendant has filed its petition for such removal in due form and within the time required and that said defendant has filed a bond duly conditioned as provided by law; and it being shown to the court that written notice of the presentment of and [26] the filing of said petition and bond has, prior to the filing thereof been regularly served upon plaintiff herein, and it appearing to this court that

this is a proper case for removal to the United States District Court,

Now, Therefore, It Is Ordered:

1. That said bond be and the same is hereby approved;
2. That the above entitled action be and the same is hereby removed to the District Court of the United States for the Southern District of California, Central Division;
3. That the clerk of this court be and he is hereby directed to prepare and certify a copy of the record in this action for filing in said District Court of the United States; and
4. That all further proceedings in this matter be and they are hereby stayed.

Dated: May 15, 1945.

PERCY HIGHT

Judge of the Superior Court.

[Endorsed]: Filed May 15, 1945, Long Beach. [27]

No. LB C-12284

State of California, County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint including Certificate for Assignment and Transfer to Long Beach, Demurrer of Defendants Compania Constructora Bechtel-McCone, S. A., a corporation and Bechtel-McCone Corporation, a corporation, Notice of filing of Petition for removal including copy of Petition for removal, copy of certain bond on removal, and copy of order removing cause to United States District Court, Petition for Removal, Bond on Removal, Minute Order of May 15, 1945 granting petition for removal, and Order for Removal to the United States District Court, Southern District of California (Central Division) in the action of Doyle McDonald vs. Bechtel-McCone-Parsons Corporation, a corporation, et al., to be a full, true and correct copy of all of the original documents on file and/or of record in this office in the above entitled action to date, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 6th day of June, 1945.

(Seal)

J. F. MORONEY

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles,

By E. Morris,

Deputy. [28]

[Endorsed]: Filed Jun. 14, 1945. No. 4549-O'C.
Copy complaint and demurrer received. [29]

In the District Court of the United States
Southern District of California
Central Division
No. 4549-O'C

DOYLE McDONALD,

Plaintiff,

vs.

BECHTEL-McCONE-PARSONS CORPORATION,
a corporation, COMPANIA CONSTRUCTORA
BECHTEL-McCONE-PARSONS S. A., a corpora-
tion, DOE ONE COMPANY, a corporation, DOE
TWO COMPANY, a copartnership, DOE THREE,
DOE FOUR and DOE FIVE,

Defendants.

ANSWER OF DEFENDANTS COMPANIA CON-
STRUCTORA BECHTEL-McCONE, S. A., a cor-
poration, and BECHTEL-McCONE CORPORA-
TION, a corporation, and COUNTERCLAIM

Bechtel-McCone Corporation, a corporation, organized and existing under the laws of the State of Nevada (sued herein as Bechtel-McCone-Parsons Corporation, a corporation), and Compania Constructora Bechtel-McCone, S. A., a corporation, organized and existing under the laws of the Republic of Venezuela (sued herein as Compania Constructora Bechtel-McCone-Parsons, S. A., a corporation), which latter corporation is not doing and never has done any business in the State of California and has not been and cannot be served in said State, but which corpora- [30] tion voluntarily appears herein for the sole purpose of defending this action on the merits and each of them, each for itself alone and for no other de-

defendant, for answer to the complaint on file herein admit, deny and allege as follows:

1. Answering Paragraph I admit that defendant Bechtel-McCone Corporation (sued herein as Bechtel-McCone-Parsons Corporation) is a Nevada corporation duly qualified to do and doing business in the State of California.

2. Answering Paragraph II admit and allege that defendant Compania Constructora Bechtel-McCone, S. A. (sued herein as Compania Constructora Bechtel-McCone-Parsons, S. A., and referred to in said paragraph as Bechtel-McCone-Parsons, S. A.) is a corporation organized and existing under the laws of the Republic of Venezuela; but deny that said defendant is now doing or that it ever has done business in the State of California either by or through defendant Bechtel-McCone Corporation as agent, or otherwise, or in any other manner whatsoever.

3. Deny the allegations and each of them contained in Paragraph III.

4. Answering Paragraph IV admit that on April 4, 1944, plaintiff and defendant Bechtel-McCone Corporation entered into a written temporary employment agreement and that a true copy of said agreement is attached to the complaint on file herein; admit that on or about May 28, 1944, plaintiff and defendant Compania Constructora Bechtel-McCone, S. A., entered into an employment agreement and that a true copy thereof is attached to the com-[31] plaint on file herein; and allege that the rights and obligations of the respective parties to said respective contracts are as therein set forth and not otherwise. Except as hereinabove expressly admitted, deny each and every allegation contained in said Paragraph IV.

5. Deny the allegations and each of them contained in Paragraphs V, VI and VII, and further deny that plaintiff has been damaged in any sum, or at all.

As and for Its Counterclaim Herein, Defendant Compania Constructora Bechtel-McCone, S. A., a Corporation, Alleges as Follows:

1. Within two years last past, plaintiff Doyle McDonald became and now is indebted to Compania Constructora Bechtel-McCone, S. A., a corporation, in the sum of \$181.36.

2. No part of said sum of \$181.36 has been paid by or on behalf of plaintiff Doyle McDonald to said defendant Compania Constructora Bechtel-McCone, S. A., and the whole thereof, together with interest at the legal rate thereon is now due, owing and unpaid.

Wherefore, defendants and each of them pray that plaintiff take nothing herein; that defendant Compania Constructora Bechtel-McCone, S. A., have and recover judgment of and from plaintiff Doyle McDonald in the sum of \$181.36; that defendants and each of them recover their costs of suit incurred herein, and for such other and further relief as may be proper.

O'MELVENY & MYERS
JACKSON W. CHANCE
LEO A. DEEGAN

By Jackson W. Chance

Attorneys for Defendants, Bechtel-McCone Corporation
and Compania Constructora Bechtel-McCone,
S. A. [32]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 19, 1945. [34]

[Title of District Court and Cause.]

ANSWER TO COUNTER-CLAIM

Comes now the plaintiff and for answer to the defendants' Counter-Claim herein, admits, denies and alleges as follows:

I.

Answering Paragraph I of the defendants' Counter-Claim herein, plaintiff denies each and every allegation therein contained.

II.

Answering Paragraph II of the defendants' Counter-Claim herein, plaintiff denies each and every allegation therein contained.

Wherefore, plaintiff prays that defendants take nothing herein and that plaintiff be rendered judgment in the amount prayed in the complaint herein, for his costs of suit herein [35] incurred, and for such other and further relief as may be proper.

RUSSELL H. PRAY—E. W. SHERIDAN

Attorneys for Plaintiff [36]

[Affidavit of Service by Mail.] [37]

[Verified.]

[Endorsed]: Filed Jun. 27, 1945. [38]

[Title of District Court and Cause.]

STIPULATION RE FINDINGS OF FACT AND
CONCLUSIONS OF LAW

It Is Hereby Stipulated by and between the parties to the above entitled action, through their respective counsel, that the decision of the court announced from the bench on Tuesday, October 9, 1945, as taken down by the stenographic reporter shall be deemed to be and constitute the findings of fact and conclusions of law in said action and that the reporter's transcript of said oral decision shall, when transcribed (subject to correction of any typographical or other errors contained in the reporter's transcript) constitute the findings of fact and conclusions of law of the court without necessity for a separate statement thereof [68] and without necessity for the court signing the same. A judgment shall be prepared by counsel for plaintiff and presented to the court pursuant to rule of court in accordance with said oral decision. This stipulation shall be without prejudice to the right of either party to urge error in the findings, conclusions, judgment or otherwise.

Dated: October 12th, 1945.

RUSSELL H. PREY

E. W. SHERIDAN

By E. W. Sheridan

Attorneys for Plaintiff

O'MELVENY & MYERS

JACKSON W. CHANCE, and

LEO A. DEEGAN

By Leo A. Deegan

Attorneys for Defendants

It is so ordered October 18, 1945

CHARLES H. LEAVY

Judge

[Endorsed]: Filed Oct. 18, 1945. [69]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4549-O'C.

DOYLE McDONALD,

Plaintiff,

vs.

BECHTEL-McCONE-PARSONS CORPORATION,
a corporation, et al.,

Defendants.

JUDGMENT

The above entitled cause came on for trial on the 1st day of October, 1945, and for further hearing and final argument on the 9th day of October, 1945, before the Court, sitting without a jury, counsel appearing on behalf of each of the parties, and the Court having heard the evidence and fully considered the law and facts, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; Now, Therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant Compania Constructora Bechtel-McCone, S. A., in the sum of eight [70] hundred fifty-two and ninety-two hundredths dollars (\$852.92).

2. That plaintiff have judgment against the defendant Compania Constructora Bechtel-McCone, S. A., for his costs herein in the amount of (\$60.55).

Dated this 18 day of October, 1945.

CHARLES H. LEAVY
Judge of United States District Court.

Approved as to form as required by local Rule 7.

O'MELVENY & MYERS
JACKSON W. CHANCE, and
LEO A. DEEGAN

By Leo A. Deegan
Attorneys for Defendants

Judgment entered Oct. 18, 1945. Docketed Oct. 18, 1945, Book C. O. 35, page 309. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Entered]: Filed Oct. 18, 1945. [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Compania Constructora Bechtel-McCone, S. A., a corporation, one of the defendants in the above entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment in said action entered in this Court on October 19, 1945.

Dated: November 23, 1945.

O'MELVENY & MYERS
JACKSON W. CHANCE
LEO A. DEEGAN

By Leo A. Deegan

Attorneys for Defendant

[Endorsed]: Filed & mld. copy to R. H. Pray & E. W. Sheridan, Attys. for plf. Nov. 23, 1945. [72]

[Title of District Court and Cause.]

STIPULATION FOR ORDER FOR DEPOSIT OF MONEY IN LIEU OF SUPERSEDEAS BOND

It Is Hereby Stipulated by and between plaintiff, Doyle McDonald, and defendant, Compania Constructora Bechtel-McCone, S. A., through their respective attorneys of record for said parties, that an order in the form hereto attached, if the same meets with the approval of the

above entitled Court, may be forthwith entered and plaintiff hereby waives notice of hearing on the application for said order.

Dated: November 19, 1945.

RUSSELL H. PRAY and
E. W. SHERIDAN

By E. W. Sheridan

Attorneys for Plaintiff [73]

O'MELVENY & MYERS
JACKSON W. CHANCE
LEO A. DEEGAN

By Leo A. Deegan

Attorneys for Said Defendant [74]

[Title of District Court and Cause.]

ORDER FOR DEPOSIT OF MONEY IN LIEU OF SUPERSEDEAS BOND

It appearing to the satisfaction of the Court that judgment in the above entitled action was duly entered on October 18, 1945, in favor of plaintiff, Doyle McDonald, and against defendant, Compania Constructora Bechtel-McCone, S. A., for the recovery of \$852.92, together with costs heretofore taxed in the amount of \$60.55; and

It further appearing that said defendant Compania Constructora Bechtel-McCone, S. A. has concurrently with the entry of this order filed its notice of appeal from said judgment to the United States Circuit Court of Appeals for the [75] Ninth Circuit; and

It further appearing that said defendant Compania Constructora Bechtel-McCone, S. A. has, concurrently with the entry of this order, deposited with the Clerk of this Court the sum of \$1300 in lieu of the supersedeas bond provided for under Rule 73d of the Federal Rules of Civil Procedure; and

It further appearing that the amount so deposited is sufficient to secure payment of the whole amount of said judgment together with the costs of said appeal and interest on said judgment;

Now, Therefore, It Is Hereby Ordered that said deposit of \$1300 be held by said Clerk in lieu of the supersedeas bond provided for under Rule 73d of the Federal Rules of Civil Procedure and that no further proceedings be taken herein with reference to the collection of said judgment or issuance of execution thereon until the final hearing and decision on said appeal and the return of the mandate thereon; and

It Is Further Ordered that if said judgment is reversed on appeal or if said defendant shall fully satisfy said judgment or such modification thereof as may be made, together with interest and costs on appeal if the same is affirmed, then the Clerk of this Court shall return said sum of \$1300 to said defendant Compania Constructora Bechtel-McCone, S. A.; otherwise said Clerk shall continue to hold said sum on deposit subject to such further order with reference to satisfying the liability of said defendant therefrom as may be proper.

Dated: November 23, 1945.

J. F. T. O'CONNOR
Judge

[Endorsed]: Filed Nov. 23, 1945. [76]

[Title of District Court and Cause.]

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 79 inclusive contain full, true and correct copies of Complaint; Notice of Filing of Petition and Bond for Removal to United States District Court except copies of Petition and Bond; Petition for Removal of Cause to United States District Court for the Southern District of California, Central Division; Bond on Removal; Order Removing Cause to United States District Court; Certificate of Clerk of the Superior Court to Removal Papers; Answer of Defendants Compania Constructora Bechtel-McCone, S. A. and Bechtel-McCone Corporation and Counterclaim; Answer to Counterclaim; Memorandum of Facts and Law; Defendants' Statement of Facts and Summary of Points of Law Involved; Plaintiff's Exhibits 1 to 7 inclusive; Defendants' Exhibits A and B; Stipulation re Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Stipulation and Order for Deposit of Money in Lieu of Supersedeas Bond; and Designation of Contents of Record on Appeal which, together with copy of two volumes of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.95 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 29 day of December, 1945.

(Seal)

EDMUND L. SMITH, Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause.]

Honorable Charles H. Leavy, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, October 1, 1945

Appearances:

For the Plaintiff: Russell H. Pray, Esq. and Edward W. Sheridan, Esq., by Edward W. Sheridan, Esq., 720 Security Building, Long Beach, California.

For the Defendants: O'Melveny & Myers, Esq., by Jackson W. Chance, Esq., 900 Title Insurance Building, Los Angeles, California.

Los Angeles, California, Monday, October 1, 1945,
11:00 A. M.

The Court: You may proceed, gentlemen.

Mr. Sheridan: Call Mr. McDonald, please.

DOYLE McDONALD,

the plaintiff, called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Doyle McDonald.

Direct Examination

By Mr. Sheridan:

Q. Mr. McDonald, what is your address?

A. 1235 Cedar Apartments, Long Beach, California.

Q. You are a resident of California, are you?

A. Yes.

(Testimony of Doyle McDonald)

Q. Mr. McDonald, what is your occupation or business.

A. Boilermaker. I have been a boilermaker, rigging construction, a welder, and a burner.

Q. Are you employed at the present time?

A. Yes, I am.

Q. Where are you employed?

A. United Concrete and Pipe, Steel Shipbuilding [4*] Division.

Q. In what capacity are you employed?

A. Leadman in rigging.

Q. Now, Mr. McDonald, I show you what purports to be or what is called an employment agreement between Compania Constructora Bechtel-McCone, S.A.—

Mr. Chance: If it will save time I will stipulate the two documents are the documents in issue—the temporary employment agreement between Mr. McDonald and Bechtel-McCone Corporation, and the permanent employment agreement between Mr. McDonald and the defendant company, Constructor Bechtel-McCone, South America.

Mr. Sheridan: I will accept the stipulation and offer first the temporary contract into evidence to be marked Plaintiff's Exhibit 1. The temporary contract is dated April 4, 1944, and signed by Doyle McDonald on that date, and I will offer it in evidence.

Exhibit 2 is denomination as the permanent employment agreement signed on May 28, 1944, by Doyle McDonald and countersigned for the company by J. Roy McCall.

The Court: They will be admitted in evidence.

(The documents referred to were marked as Plaintiff's Exhibit No. 1 and No. 2, respectively, and were received in evidence.)

[PLAINTIFF'S EXHIBIT NO. 1]

Bah. D-4

JCB:ms

8-18-43

SALARY ALLOTMENT—BAHREIN EMPLOYEES

Bechtel-McCone-Parsons Corporation

Acting Under and Pursuant to Sub-Contract

With Compania Constructora Bechtel-McCone-

Parsons S. A.

570 Mills Building

San Francisco, 4, California

Employee Doyle McDonald

Gentlemen:

Starting with salary payable on April 20th, 1944, and thereafter until terminated or amended by written notice, you are hereby authorized to make the following allotment of all salary payments due the undersigned under his Temporary Employment Agreement with Bechtel-McCone-Parsons Corporation, dated April 4th, 1944, and Permanent Employment Agreement with Compania Constructora Bechtel-McCone-Parsons-S. A.

<u>Item No.</u>	<u>Monthly Deductions</u>	<u>Amount</u>
1	Field Allotment to be paid at Bahrein	\$50.00 per month
2

(Plaintiff's Exhibit No. 1)

3 Balance of Earnings to be
Deposited

In Farmers & Merchants Bank,
American Avenue Branch, lo-
cated at 1401 American Ave-
nue, Long Beach, California,
to the credit of Savings Ac-
count Number 10335 of Doyle
McDonald.

.....

You are authorized to reply to inquiries in connection
with my salary only to - - - -

Very truly yours,

Doyle McDonald

Dated at Los Angeles, California, this 4th day of
April, 1944.

Approved:

Bechtel-McCone-Parsons Corporation
Acting Under and Pursuant to Sub-
Contract with Compania Constructora
Bechtel-McCone-Parsons S. A.

By Wm. T. Dodson

Date April 4, 1944

(Plaintiff's Exhibit No. 1)

Bah. D-5

JCB:ms

9/1/43

[Written]: L.A. K. Colonel Jameson, Head of Personnel.

BECHTEL-McCONE-PARSONS CORPORATION

Engineers-Constructors

Mills Building, 220 Montgomery Street

San Francisco, 4, California

TEMPORARY EMPLOYMENT AGREEMENT

April 4, 1944

The undersigned, Bechtel-McCone-Parsons Corporation, has entered into a written agreement with Compania Constructora Bechtel-McCone-Parsons S. A. to engage persons in the United States who will render services for the latter Corporation which is the Construction Contractor under written agreement with The Bahrein Petroleum Company Limited to perform certain refinery construction work at Bahrein, Persian Gulf, and in the vicinity thereof.

It is understood that you are willing to enter into an employment agreement with said Construction Contractor to perform your services at Bahrein, Persian Gulf, and in the vicinity thereof, in accordance with the terms and conditions set forth in the attached contract.

Pursuant to the above mentioned agreement with Compania Constructora Bechtel-McCone-Parsons S. A. and contingent on your securing a passport and meeting our

(Plaintiff's Exhibit No. 1)

requirements of physical examination, we hereby engage you to proceed to Bahrein, Persian Gulf, at the salary and compensation, and upon the terms and conditions set forth in the attached contract, said salary hereunder to commence on the 20th day of April 1944. You are hereby assured that when you arrive at Bahrein, Persian Gulf, the attached contract will be duly executed by said Construction Contractor, and you hereby agree to execute the attached contract upon arrival at Bahrein, Persian Gulf, and thereupon your employment hereunder shall terminate and your employment by said Construction Contractor shall commence in accordance with the attached contract.

BECHTEL-McCONE-PARSONS CORPORATION

Acting Under and Pursuant to Sub-
Contract With Compania Constructora
Bechtel-McCone-Parsons S. A.

By: Wm. T. Dodson

Wm. T. Dodson

Ass't Foreign Employment Manager

I Accept the Foregoing This 4th Day of April, 1944.

Doyle McDonald

as

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 1. Filed Oct. 1, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 2]

COMPANIA CONSTRUCTORA
BECHTEL-McCONE-PARSONS S. A.
EMPLOYMENT AGREEMENT

DOYLE McDONALD

This Memorandum sets forth the terms, conditions and privileges of the employment agreement between the above-named Company and Employee, as follows:

1. Term and Place of Service

Company hereby engages Employee and Employee hereby agrees to serve Company as a Boilermaker, (or in such other capacity as Company may from time to time require) in Company's Zone of Operations for a period of eighteen (18) months from the date Employee shall report for duty at Bahrein, Persian Gulf, namely,

As herein used "Zone of Operations" is understood to mean Bahrein, Persian Gulf, and any other locality around the Persian Gulf to which Employee may be transferred for service.

2. Out Passage

Employee departed from Los Angeles, California, on April 24, 1944. Employee was furnished transportation from Los Angeles, California, hereinafter referred to as Employee's Home, to Bahrein and a Travel Allowance in the sum of (\$30.00) Thirty Dollars for which Employee shall render an Expense Account.

3. Salary

Company agrees, commencing on the 3rd day of May, 1944, to pay Employee a salary at the rate of Four Hundred Fifty Dollars (\$450.00) per month on the basis

(Plaintiff's Exhibit No. 2)

of 52 hours work per week. All work in excess of 52 hours per work week or in excess of 10 hours per day shall be considered overtime and payable on a straight time basis with the exception that said overtime provision will not apply to time spent in travel hereunder.

4. Meals and Sleeping Accommodation

While Employee is at Bahrein, Persian Gulf, Company shall furnish him free meals and sleeping accommodations through available facilities which Employee shall be required to accept and utilize.

5. Industrial Injury

In the event Employee shall suffer injury (which term shall include occupational diseases and death proximately caused by such injury) arising out of and in the course of employment hereunder, irrespective of negligence on the part of either the Employee or Company, Company shall voluntarily pay Employee or his dependents compensation as determined and measured by the standards of the Workmen's Compensation Act of the State of California, U. S. A. Such compensation shall be in lieu of any other liability of the Company to the Employee or his dependents. Company is hereby subrogated, up to the amount of compensation paid, to any right of action or damages which Employee or his representative may have or recover in the future against or from any third party liable for an injury in consequence of which Company has paid compensation.

6. Conduct of Employee

Employee hereby undertakes and agrees: To comply with and abide by all general regulations and instructions from time to time issued by Company, or by The Bahrein

(Plaintiff's Exhibit No. 2)

Petroleum Company Limited, including those governing hours and conditions of work, and to obey all lawful orders given by the company, its Manager, or other duly authorized person or persons.

To conduct himself at all times in such a manner as not to bring discredit upon himself or Company and to abide by all laws of the country and locality in which he is working. Employee shall not engage, directly or indirectly, in any other employment, service or business whatever, nor shall he take part in local politics. Employee shall not, during the term of this Agreement or thereafter, impart any information relative to the business or affairs of the Company to anyone except to those employees of the Company who are entitled to receive such information. If Employee shall absent himself from his work or duties without permission, he shall not be entitled to any wages or salary or to any allowance whatsoever for such a day or days of absence.

7. Inoculations and Vaccinations

Employee agrees to receive at his own risk and at the expense of the Company, and at the time and from the Doctor or Doctors designated by the Company, such inoculations, vaccinations and examinations as shall be specified by Company.

8. Marital Status

Employee hereby states that he is single.
~~married.~~

9. Termination by Company or Employee

(a) Either Company or Employee may terminate Employee's service hereunder at any time by giving one to

(Plaintiff's Exhibit No. 2)

the other previous written notice of intention so to do. The minimum period of said notice shall be one month.

(b) Alternatively at its discretion Company may terminate Employee's service hereunder at any time without previous notice upon payment to Employee of a sum of money equivalent to salary for the required period of notice.

10. Termination by Company for Cause

Company may summarily terminate Employee's service hereunder at any time for Cause, such as insubordination, intemperance, use of narcotics, venereal disease, self-injury wilfully inflicted; non-compliance with Company's regulations or instructions, dishonesty, misconduct, inefficiency, or if Company is requested to dismiss Employee by any Government official or by any representative of the client of the Company.

11. Employee's Departure

Upon completion or in the event of termination of Employee's service hereunder, it is understood that Employee must depart from the Zone of Operations on the date specified by the Company.

12. Return Passage

(a) Upon completion of Employee's full term of service hereunder as defined in 1, or upon prior termination thereof by Company for any reason other than Cause, or by Employee during any extension of said term of service as provided for in Paragraph 16, Company shall pay all necessary expenses of Employee's passage to his Home of the class and by the route designated by the Company and pay Employee up to date on which Employee would

(Plaintiff's Exhibit No. 2)

ordinarily reach his Home traveling by the said route or up to the date of termination, whichever date is the later.

(b) In the event that Employee's services hereunder shall be terminated by the Company for Cause during the Employee's full term of service hereunder as defined in 1, or during any extensions of such term of employment as provided for in 16, or by Employee prior to full term of service hereunder as defined in 1, Company shall be under no obligation to pay, or to contribute in any manner to the expenses of the Employee's passage to his Home nor to pay Employee any salary for the time consumed in returning thereto or for any other period beyond the date of such termination. Company may, at its discretion, purchase for Employee, at Employee's expense, tickets or vouchers good for Employee's return passage or any portion thereof, and Company is hereby authorized to withhold and retain from any sums due from Company to Employee the amount necessary to cover the cost of any tickets or vouchers so purchased.

13. Inability to Perform

If Employee, for any reason, shall be or become unable to perform or shall be prevented from performing the services herein contracted for, the Employer shall have no obligation to continue payment of the salary or compensation, and expense allowance, or any part thereof as herein provided, except only in case of brief illness, or brief disability due to accident.

14. Currency and Exchange

Any amounts which may become due Employee from Company and are authorized to be paid to Employee at

(Plaintiff's Exhibit No. 2)

Bahrein or which may become due Company from Employee shall be paid at the rate of exchange and in the currency that Company considers fair and equitable. Company will deposit to Employee's account in dollars in the United States such portion of Employee's salary as Employee directs in advance; provided Company shall not be liable after placing a check for the amount specified by Employee in an envelope duly stamped and addressed to the person or account specified by Employee and placing such envelope in the regular mails.

15. Inventions and Patents

Company shall be entitled to the sole benefit and exclusive ownership of any inventions or improvements in plant, machinery, processes or other things used in the business of the Company which may be made or discovered by Employee while he is in the service of Company and all patents for the same, and Employee shall do all acts necessary or required by Company to give effect to this paragraph.

16. Extension of Agreement

If, upon the request or with the consent of Company, Employee continues in this employment beyond the period described in Paragraph 1, this Agreement shall remain in effect during continuance of such service.

17. Burial Release

Employee hereby authorizes and directs Employer, in the event of death of said Employee while outside of the United States and during the term of this contract, to make such disposition as seems best under the circumstances prevailing at the time, of the person and personal effects of said Employee.

(Plaintiff's Exhibit No. 2)

18. Limitation of Terms

This contract embodies the whole agreement between the parties hereto and there are no inducements, promises, terms, conditions or obligations made or entered into by the Employer other than contained herein.

19. Home address

Employee hereby authorizes and directs Employer in the event of accident or emergency to notify Mrs. Myrtle McDonald (mother) at General Delivery, Joplin, Missouri. This address may be considered Employee's permanent home address, or the address of the person with whom Employer may communicate concerning personal matters relating to Employee. Employee hereby authorizes and directs Employer to.....

.....

The foregoing provisions are understood and agreed to by the undersigned.

Doyle McDonald
Co. Const. Bechtel-
McCone-Parsons S. A.
J. Roy McAuliffe

Date and Place of Signing.

Bahrein Island

May 28, 1944

es

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 2. Filed Oct. 1, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

(Testimony of Doyle McDonald)

Q. By Mr. Sheridan: Now, Mr. McDonald, on the 4th of [5] April, 1944, you entered into the temporary employment contract, did you not? A. I did.

Q. And was that employment contract executed in Los Angeles? A. Yes, in Los Angeles.

Q. And you signed that agreement there?

A. I did.

Q. And what officer or what person signed the contract with you, if you know?

A. I believe it was a Mr. Dodson, assistant personnel manager.

Mr. Chance: I will stipulate it was signed by William T. Dodson, assistant employment manager of Bechtel-McCone Corporation.

Mr. Sheridan: The Nevada Corporation?

Mr. Chance: The Nevada corporation, yes.

Mr. Sheridan: So stipulated.

Q. Now, Mr. McDonald, after the 4th of April, 1944, and after the execution of this temporary employment contract had you agreed to work for the Bechtel-McCone South American corporation?

Mr. Chance: Object to that as calling for a conclusion of the witness. The contract speaks for itself. I will stipulate with you, counsel, the contract so provides. [6]

Mr. Sheridan: Very well.

Q. After the execution of the temporary employment agreement of April 4, 1944, what did you do, Mr. McDonald?

A. I think it was on approximately the fifth. We were told to return home and wait, and approximately on the fifth, I believe, we were told to be ready to entrain that evening for the East Coast.

(Testimony of Doyle McDonald)

We went by way of Chicago and down to Virginia to the port of embarkation. Then we stayed there for several days. We boarded a ship and went to Oran, Algiers, and then we stayed there for several days. We boarded a plane and went from Oran, Algiers, to Algiers, Algeria. I stayed there approximately one hour and boarded another plane and went to Cairo, Egypt. We stayed there two or three days and boarded another plane flying to Iraq. We stayed there over night because of a storm and the next morning and day we went to Bahrein Island.

Q. Now, Mr. McDonald, during the entire trip, after leaving Los Angeles and going across country to Virginia, and leaving Newport News by ship and taking your various plane trips to your arrival at Bahrein Island, were all of your expenses paid?

A. No, they were not exactly—not all of them.

Q. What part of your expenses, if you know, were not paid? [7]

A. At landing at Payne Field in Cairo, Egypt, we asked for food. We had been in the air approximately eight or nine hours and they said, "We will worry about that later," so all of us fellows went in and out of our own pocket we purchased our own food. The next morning when we got up they said food was not available so we went down to an English restaurant and purchased our own food.

Q. How much did you spend there yourself, personally?

A. It was in the percentage of pounds—Egyptian pounds. They called it one pound represented \$4.13. We spent approximately \$1.00 or \$1.50 at that one point for our own food.

(Testimony of Doyle McDonald)

Q. Did you have any other expenses which you paid personally?

A. We were supposed to go direct from Cairo, Egypt to Bahrein Island but there was a sand storm in progress. We couldn't make it through, so we landed at an English airport and stayed over night. The expenses for over night lodging and the food were paid by ourselves and from then on all our expenses were paid by the company.

Q. How much were your expenses for lodging?

A. That was in the Iraquian type of money which I didn't know the value of.

Q. Well, do you have any approximate idea how much it was? [8]

A. Roughly, I would say about \$1.50—maybe two or three dollars. I just couldn't say definitely. It couldn't have been much more than that.

Q. Well, do you remember on what date you arrived at Bahrein Island, Persia?

A. No, I definitely could not say offhand.

Mr. Chance: May we stipulate, counsel, it was May 28, 1944, when he arrived at Bahrein Island?

Mr. Sheridan: I don't know whether we can stipulate it was the 28th or not.

Mr. Chance: Or about that date.

Mr. Sheridan: Because the witness has testified he left America on the fifth, left Los Angeles on the fifth, and it takes approximately 30 days to arrive from here in Persia.

Mr. Chance: Just to clear that up. I do not want to interrupt, but to clear it up could we refresh his recollection by reference to the permanent employment agreement which records that he departed from Los Angeles—it is

(Testimony of Doyle McDonald)

in your exhibit to your complaint and in page 1 of the permanent employment agreement. It states:

“Employee departed from Los Angeles, Cal., on April 24, 1944.”

Mr. Sheridan: I will stipulate that the plaintiff departed from Los Angeles on the 24th day of April, 1944, [9] and that under the existing travel conditions he would arrive in Bahrein Island, Persia, on or about the 24th day of May and prior to the 28th day of May.

Mr. Chance: I think the records show he arrived on the 28th of May, if we could simply agree on that.

Mr. Sheridan: Very well, let the record show the arrival was on the 28th day of May, 1944.

The Court: Then there is no issue on the matter of when he went on the payroll at his monthly salary?

Mr. Sheridan: The contract shows that as May 3rd.

The Court: The temporary contract says April 20th.

Mr. Chance: The record will show he went on the temporary employment agreement with the defendant Bechtel-McCone Corporation on April 20, 1944. The salary under the temporary employment agreement commenced and then when he left the country he went on the payroll of the defendant company, South American Company, Compania Constructora Bechtel-McCone, South America, on May 3rd, 1944. I believe that was the actual date they departed from the East Coast at Newport News. It was the practice to place an employee on the payroll of the South American Company when they went on the boat, which was the construction company doing the job abroad and that his salary was continuous from April 20, 1944, through to the date of his termination. [10]

(Testimony of Doyle McDonald)

Mr. Sheridan: Yes.

Q. Mr. McDonald, on arrival at Bahrein Island what did you do?

A. We were taken by a guide or he was, I suppose, an assistant personnel manager, and we were taken around in a truck and shown to our various houses, and our equipment was taken with us and we were lodged there and told to report for work the following day, which I did.

Q. And after reporting for work on the following day did you continue to work for the defendant company?

A. Yes, up until I left.

Q. And, Mr. McDonald, between the 28th or 29th day of May and the date that you left what type of duties did you perform?

A. I performed what they would call a boilermaker, assembling a bubble tower and also as a boilermaker assembling a smokestack and in conjunction with those I performed as a welder and tacker and burner and lay-out man.

Q. But the capacity for which you had been hired specifically was boilermaker, was it not?

A. Yes, sir.

Mr. Chance: Object to that on the ground it calls for a conclusion of the witness.

Mr. Sheridan: The contract specifically states the plaintiff was employed as a boilermaker. [11]

Mr. Chance: May I point out that the permanent employment agreement on page 1, in Paragraph 1, states that:

"The Company hereby engages employee and employee hereby agrees to serve Company as a boilermaker (or in

(Testimony of Doyle McDonald)

such other capacity as Company may from time to time require)."

and so on. I believe the contract speaks for itself.

Mr. Sheridan: Well, that is what we are relying on.

The Court: He may testify as to what other capacities he worked in besides that of boilermaker.

Mr. Chance: I have no objection to his testifying what classification he actually worked in. My only objection was to the form of the question which, as I understand it, asked him what he was employed to perform. I think there is a difference there. The Company had the right to assign him to such duties in addition to boilermaking as it deemed proper. I don't think there is any issue on that.

Mr. Sheridan: There is no question of that. All I was wanting to do was clarify the fact that this man was hired as a boilermaker primarily, according to his contract.

The Court: Proceed.

Mr. Sheridan: And that was what he was doing.

Q. Now, Mr. McDonald, from the 28th day of May until the time you left Bahrein Island you stated that you worked on a bubble tower and on a smokestack? [12]

A. That is right.

Q. At the time of your arrival which of the jobs did you start on, the bubble tower or the smokestack?

A. I started to work on the bubble tower upon my arrival.

Q. Well, will you state to the court in your own words, Mr. McDonald, what you did with the bubble

(Testimony of Doyle McDonald)

tower and what type of work you were doing on it until you were transferred to the stack?

A. A bubble tower is an object prefabricated in sections of approximately 20 tons. It has a semblance to a large pipe 12 feet in diameter rising approximately 150 feet into the air. These sections are assembled horizontally on the ground, laying on wooden blocks and welded together and then the whole thing is taken to its site on rollers and hoisted into position with cranes. Our job was to weld up, fit up, fair up, true up the seams of the sections that were to be assembled.

Q. And that is what you were doing?

A. That was my first job on Bahrein Island.

Q. How many of these sections did you fit up and true up prior to your transfer to the smokestack?

A. We had approximately three of them finished and at the time I was forced to leave the job I was on the fourth section, I believe. [13]

Q. You state you were forced to leave the job. What do you mean by that?

A. I was told I was fired.

Mr. Chance: I object to that and ask that the answer be stricken on the ground we are entitled to know the persons present, the persons in the conversation and so on.

The Court: Objection will be overruled and exception allowed.

Q. By Mr. Sheridan: Now, Mr. McDonald, would you be able to delineate by a drawing approximately how these sections of pipe look? Would you step down to the board and draw the sections of the pipe so the court can see what we are talking about?

A. Assuming that the pipe was laying horizontally on the ground. This would be the ground. This would be

(Testimony of Doyle McDonald)

the pipe, 12 feet in diameter. There would be another section of pipe over here to join into this one. You would come to 1-16th when you had the pipes ready to be welded. There would be a one-sixteenth, approximately, width of that line all the way around.

Q. You mean a one-sixteenth of an inch?

A. One-sixteenth of an inch, yes. And then they must be tack-welded approximately every four feet. That would be production tack-welding and a certified welder should do that, but in the process of putting these together you have [14] to put wedges approximately, anywhere from 16 to 24 key plates on that to pull it together, which consumes approximately two and a half or two working days. Then after you do that and get it right and the inspector passes on it, you production weld approximately every four feet around there. A production weld covers approximately six to eight inches which will be three or four pounds of welding metal displaced from the rods into here in the process of welding.

After you have tack-welded you go back and true it up and see if it is directly straight and if it is straight then the production welders come in and finish welding the pipe together, which should take approximately two or 250 pounds of weld to complete it, and it takes two or three days to complete the weld because there are inspectors there and you are under strict surveillance from the inspectors and after one pass is made of a weld on there they must come in with air guns and drive that metal in the process of osmosis forcing it to release its grip and tension so it won't bring the pins out of alignment. The welding should and the fitting should be completed in approximately five days.

(Testimony of Doyle McDonald)

Q. Mr. McDonald, you state that these pipes were 12 feet in diameter. Is that true? A. That is right.

Q. And how much did each one of these sections weigh? A. Approximately 20 tons. [15]

Q. Now, how were these sections joined together prior to welding the sections?

A. They were joined together with key plates and wedges.

Q. Could you draw a key plate in order to make it more clear for the court when you mention those things?

A. I can draw a key plate on an exaggerated principle. Assuming that a flat plate was laid over that approximately 24 inches by 18—18 by 24. There was a hole burned out in here, in this key plate, and there was a hole burned out here and this had a riser, this key plate here proper, on this metal proper, it had a riser on it and a slight riser on this. Then we would weld a lug or they call them dogs onto here and from this riser here we would drift a wedge down through. And in this process the same over here. We would set two wedges tight in there and after we got it fit up we would keep continually pounding these wedges. The pressure against this dog, which was welded to the pipe and the pressure against this lug which was also welded on the key plate, forced these two to move one way or the other as you saw fit to make it fit up and it took a series of finishing and fitting up and fairing up to complete it. It took approximately anywhere from 18 to 24 to complete the job on the circumference.

Q. How many plates, key plates, do you have to attach [16] to that so you would be able to say that that

(Testimony of Doyle McDonald)

section of pipe had met with the other section for final welding?

A. For fitting up and final welding you would have to have anywhere from 18 to 24. That is to hold it so the inspector would pass on it and OK such procedure. For just holding it in place two would be enough temporarily—just to hold it, to keep it from falling apart over night; two key plates, one on each side, would hold it.

Q. That would be sufficient? A. Yes.

Q. Very well, you can resume the stand, Mr. McDonald.

Now, Mr. McDonald, you stated that you worked, when you first arrived on the bubble tower. After your arrival were you subsequently transferred to a smokestack?

A. Yes, I was.

Q. Approximately how long after you arrived were you transferred to work on the smokestack?

A. Approximately two weeks, I would say.

Q. How long did you work at the smokestack?

A. About two weeks, maybe three. I am not sure.

Q. And after that three-week period of working on the smokestack where, if any place, did you go?

A. I was transferred back to the bubble tower.

Q. Now, Mr. McDonald, during the time that you worked [17] from your arrival until you left Bahrein Island, who was your immediate foreman or superior?

A. My immediate foreman was a gentleman by the name of Tam.

Q. Now, during your work on the bubble tower and upon the smokestack was Mr. Tam your foreman on both jobs? A. He was.

(Testimony of Doyle McDonald)

Q. Was Mr. Tam the gentleman who assigned you to the bubble tower when you first arrived?

A. Yes, he was.

Q. Was Mr. Tam the person who sent you to the smokestack? A. He was.

Q. Was Mr. Tam the man who re-assigned you from the smokestack to the bubble tower?

A. Yes, he was.

Q. Now, Mr. McDonald, do you know or recall on what date you terminated your employment with the Bechtel-McCone Corporation, South America?

A. I believe it was the 10th of July.

Q. Of what year?

A. I couldn't say for sure. It was either 1943 or 1944. I am not sure.

Mr. Chance: We will stipulate it was in 1944.

Mr. Sheridan: Yes, I will accept that stipulation. [18]

Q. Mr. McDonald, will you state in your own words to the court what were the circumstances which led you to terminate your employment?

A. There had been—

Mr. Chance: Counsel, may I object and ask you to let him state who was present and so on and then we can follow along with him and make our record.

Mr. Sheridan: Yes.

Q. Mr. McDonald, will you tell the court in your own words what led up to the termination of your contract, and in your statement tell who was present at the time this conversation, if any, occurred between you and other members of the company. Tell who these persons were and what their names were, if you know.

A. We were in this one particular incident relating to my termination, we went to work rather early in the

(Testimony of Doyle McDonald)

morning and at two o'clock we had accumulated the amount of eight hours time, working time. We ate lunch at approximately, somewhere about 10 or 10:30. I would not say just exactly when, but approximately at the middle of the eight hours, but at two o'clock when the whistle blew all the boilermakers and their helpers, their assistants, left the job.

Now, the riggers came in an hour later than we did of that morning and worked one hour later than we did to get in their eight hours. They moved a large crane down there [19] the only one they had on the island of any size for heavy work, and—

The Court: What date was this? That wasn't July 10th, was it?

The Witness: No, sir. I think it was about, approximately July 9th, sir. I am not positive of the date but it is right in that vicinity. They moved the crane down there and a fellow came over and said Tam wanted me to work one hour overtime to put this bubble tower section in place.

Q. By Mr. Sheridan: Do you know the name of the man that gave you this information?

A. He was just a fellow that was working there. I didn't know his name.

Q. Very well.

A. Other than seeing him around the job. I went ahead and I didn't know whether to work because we had definite orders not to work overtime. It was intense heat and high humidity and very, very depressing and they didn't want us to work overtime either one hour or 15 minutes, or ten minutes, under any conditions for fear of physical exhaustion. So I went up to see Mr. Vessels, who was the only superintendent at the time, or foreman

(Testimony of Doyle McDonald)

at the time, available, and he said, "Yes, go ahead." He said, "I will give you an OK to go ahead and work overtime." Slightly after our lunch period and about 10 o'clock in the morning I didn't see Mr. [20] Tam after that until 20 or 30 minutes after two o'clock—after the two o'clock whistle had blown. So, I was working on and I had secured it with key plates for an over night hanging and I had done all the work myself. The crane men do their work and I do my work with helpers but my helpers had gone home. That is the coolies or natives of that country. When the whistle blew they went home. They quit just like falling off of a job. Well, Tam came around the edge of the bubble tower. I had been swinging a 12-pound hammer against these key plates pulling this 20-ton section. The sweat was running down off me. I was soaking wet with sweat and I had been doing the work by myself and I had secured it and was about ready to go home. As far as the securing process was concerned, it was secured and that released the crane. He came around and he said, "Where in hell are the turnbuckles?" And I said, "Tam, we never could—we never have been able to use turnbuckles on this." I said, "It is a hopeless case, hopeless effort," and I said, "I have got it secured this way," and I said, "We can finish it in the morning, with key plates. It is up as close as we can get it." I said, "We can release the crane. It can go ahead with its other work." He said, "I told you to get some turnbuckles," and I said, "That was three or four days ago," and I said, "I am not exactly a pack horse or a mule. I sent my coolies after them and they couldn't [21] find them." I said, "I asked you several days ago to give me a truck so I could go down and haul up the turnbuckles and other equipment which we needed very bad."

(Testimony of Doyle McDonald)

So, one word led to another and I was rather hot and exhausted under the conditions of the weather and the work I was doing by myself, so he said, "You are fired." The only thing I knew to do was to hit the fellow offhand and I didn't do that. I intended to, but I didn't do it. So I went over to Mr. Einer, the inspector, and I said, "Mr. Einer, it has been a pleasure to work for you."

Q. Mr. McDonald, excuse me. Was Mr. Einer present when you had the conversation with Mr. Tam?

A. That is right.

Q. Who else was present besides Mr. Einer?

A. The riggers on the crane.

Q. Do you know the names of any of the riggers on the crane? A. I do not.

Q. Were there any coolies present at that time?

A. There were no coolies present. They had all gone home when the whistle blew. This all occurred about 20 minutes after the whistle blew.

Q. Will you continue with your conversation with Mr. Einer?

Mr. Chance: May I inquire of the witness on voir dire [22] as to whether Mr. Tam was present, within hearing range, at the time this alleged conversation with Mr. Einer took place?

The Witness: He was standing approximately 15 feet away.

Mr. Chance: Then I object to the witness testifying to a conversation out of the presence of the defendant or any of the defendant's representatives. And may I ask the witness whether Mr. Einer was an employee of the construction company or an employee of the Bahrein Petroleum Company, Limited, the owner of the oil field?

(Testimony of Doyle McDonald)

Mr. Sheridan: You can answer that if you know, Mr. McDonald.

The Witness: I don't know definitely. I couldn't say.

Mr. Chance: He was the oil company's inspector, was he not?

The Witness: He was representing the inspection of the welding on the bubble tower. That is as far as I know.

The Court: The objection will be overruled.

Q. By Mr. Sheridan: Go ahead and state what your conversation with Mr. Einer was, Mr. McDonald.

A. I said, "It has been a pleasure to work for you. Mr. Einer." He was a swell fellow and we had gotten along beautifully all through the process of building the bubble tower, which was very intricate and very detailed and there [23] had never been a harsh word between us under any conditions.

Mr. Chance: I move to strike the late statement as being self-serving.

The Court: It probably is not relevant but it may stand. Proceed.

The Witness: There had never been a harsh word between us. So he said to me, he said, "What is the matter with Tam?" He said, "Can't he get away and leave people alone and let them do the work?" He said, "Doesn't he know when he is well off as a foreman?" I said, "I don't know." I said, "You heard the argument." I said, "At least you saw part of it." So I went over to wait for a bus to haul me back to Awali.

Q. By Mr. Sheridan: How far was Awali from the site where you and Mr. Tam had your conversation?

A. Approximately 7 or 8 miles.

(Testimony of Doyle McDonald)

Q. That was from the site of your work?

A. Yes.

Q. The Awali was the main camp where you lived?

A. That was the main camp.

Q. And boarded? A. Yes.

Q. Very well, continue.

A. Mr. Vessels came out and saw me there and he said, "Well, Mac, did you get the vessel fixed up?" And I said, [24] "I did." I said, "I got it secured and then I got fired," and I said, "Tam and I had a run-in," and I said, "It is one of those things that happen." I said, "He told me I was fired so I left the job." "Oh," he said, "Oh, no, that can't be." He seemed to be disappointed and he says, "Now, wait a minute." So we went to talking about the whole procedure and he said, "Well, we will see what we can do about it." He said—

The Court: What was Mr. Vessels' connection with the employer?

The Witness: Mr. Vessels was a sort of—at that time, at that particular time, sir, he was a sort of general consulting engineer.

The Court: Was he a superior of Mr. Tam?

Mr. Chance: I will stipulate with counsel that Harold Vessels was the Assistant Project Manager of the defendant company of South America and had authority in that regard.

The Court: And was superior to Tam?

Mr. Chance: Yes.

The Court: Proceed.

The Witness: He called Mr. McAuliffe, who was more or less coming into his office.

(Testimony of Doyle McDonald)

Q. By Mr. Sheridan: Will you state to the court who Mr. McAuliffe is?

A. Mr. McAuliffe was the superintendent of construction [25] for this corporation.

Mr. Chance: I will stipulate with counsel that Roy McAuliffe was the Project Manager of the defendant company, Compania Constructora Bechtel-McCone, South America, and in complete charge of the construction on Bahrein Island.

Mr. Sheridan: Very well, I will accept that stipulation.

Q. Continue with your conversation.

A. So, Mr. Vessels asked me to explain to Mr. McAuliffe, which I did, and I said, "Mr. McAuliffe, I came a long ways." I said, "I have been on foreign construction working here," and I said, "I don't want to lose my job." I said, "If I cannot work for him I would like to work with somebody else on the project and carry on." I said, "I don't think it is because of my ability. It is more or less a personal enmity." The best that I could see—

Q. You mean person enmity between yourself and Tam?

A. And Tam. And I said, "My work has spoke for itself which Mr. Vessels will verify," and he said, "That is right." He said, "He is a very good workman," and he said, "We need him and we need more like him."

Mr. McAuliffe said, "Very well, then, I will turn it over to Mr. Vessels and he can take care of it from here on." So Mr. Vessels the next morning reported to Mr. Gratz, I believe, about this conversation. I was only told it. I did [26] not hear it. So later on he said, "Well, wait now—"

(Testimony of Doyle McDonald)

Mr. Chance: Excuse me a moment. May we have the record show this was to whom and what?

Q. By Mr. Sheridan: You said Mr. Vessels said something to you? A. I beg your pardon?

Q. Did Mr. Vessels say something to you? What is this conversation you are talking about now, Mr. McDonald?

A. At the time Mr. Vessels and Mr. McAuliffe were together, Mr. McAuliffe told Mr. Vessels before me, he said, "Very well, I will turn it over to you, Mr. Vessels and you take care of it and clarify the situation." That meant work it out the best he could.

So Mr. Vessels went to Mr. Gratz. He was general foreman of the boilermakers. Mr. Vessels told me that and he said, "We haven't—"

Mr. Chance: Just a moment.

The Court: You cannot testify to what you did not hear him say.

Q. By Mr. Sheridan: Only tell what you heard, Mr. McDonald, in conversations that took place in your presence.

A. Yes, sir. So the next morning Mr. Vessels asked me to come back, and he said, "I don't want you to run off." I said, "It is not my intention to. I want to go to work somewhere else." He said, "Well, we will fix something up [27] sure."

The next morning I was out there and this Mr. Gratz came up to me. He was a general foreman of boilermakers, and he asked me, he said, "Why is it you go to the office when you have an argument?" He said, "Don't you know who your boss is?" And I said, "Well, I assumed that Tam and you were." He said, "Well, that is

(Testimony of Doyle McDonald)

not right to go to the office." I said, "I didn't go to the office." I said, "Mr. Vessels came out to me when I was standing in front of the office, where was the legal place for a bus stop that I could catch to Awali." So he went on kind of maliciously—

Mr. Chance: Just a moment. I object to that statement.

Q. By Mr. Sheridan: Just state the conversation.

A. He said, "It is a funny thing that you fellows can't find out who your bosses are and do your talking with them." I said, "I could do that and I am willing to, but," I said, "the thing came up where I couldn't help it." He said to me, he said, "Well, you are fired." He said, "You are not going to work anywhere else on this island." He said, "That is for damn sure." Those are the very words he said.

So Mr. Vessels came out later and he said, "Mac, go on out there and go to work, why don't you?" And I said, "I just got through talking to Mr. Gratz and he told me I was fired and through." [28]

Mr. Chance: Will you read the answer back, Mr. Reporter?

(Answer read.)

Q. By Mr. Sheridan: After you told Mr. Vessels that Mr. Gratz had told you you were fired and that you were through, what did Mr. Vessels respond?

A. He said, "I will probably have to see about it later but," he said, "as far as I know I can't go any further." I said, "Well, I am going back to camp." I went back to camp and the whole situation was rather perplexing so I went to bed immediately. I was asleep and Mr. Paine, the personnel manager, came down and woke me up. He said, "I have some papers here for you to sign." I asked him,

(Testimony of Doyle McDonald)

I said, "What are they?" And he said, "It is to get you off of the island and on your way back home." I said, "What about the slip, my termination?" He said, "Well, I will stipulate on that that you quit." He said, "You would like it that way much better, wouldn't you?" And I said, "You can't make it anything else but fired." I said, "A fellow is fired. He is fired and that is all there is to it." I said, "It is actually—it is more or less immaterial to me." I said, "I will sign the papers down in your office later." And after that it was just a matter of waiting for transportation out.

Q. Do you remember if you signed any papers stating [29] that you were resigning or that you had been fired or discharged?

A. I never signed anything to that extent that I recall.

Q. Well, subsequent to this conversation with Mr. Paine how long a time elapsed prior to your leaving Bahrain Island?

A. The time I talked to him? I must have left about two or three days after that. It was only a short period of time.

Q. By what means of transportation did you leave?

A. By the Air Transport Command from Bahrain Island to Albania and from there direct to Cairo.

Q. Now, Mr. McDonald, from the time that you had your last conversation with Mr. Vessels until the expiration of the two or three days prior to your leaving Bahrain Island, at any time did Mr. Vessels or any other agent in control of the company at Bahrain Island offer you a job with other crews, in any capacity on Bahrain Island?

A. They did not.

(Testimony of Doyle McDonald)

Q. Had you made any statements to Mr. McAuliffe or Mr. Vessels as to your intention to perform the contract and to work if they gave you a job?

A. I told Mr. McAuliffe I wanted to perform the contract, carry on and work for anybody else. He said, [30] "We have been transferring men up until recently, but," he said, "so many men have been trying to transfer away from the boilermakers that we are going to have to put a stop to it sometime, and we might as well start now." They had been having continual trouble.

Mr. Chance: Just a moment. I object to the last statement.

The Court: Yes, the last statement may go out.

Q. By Mr. Sheridan: Did Mr. McAuliffe promise to transfer you at all to any other job on Bahrein Island?

A. No, he did not.

Q. Did he offer to? A. No, he did not.

Q. Did any other company employee prior to your departure from Bahrein Island offer to transfer you to another job or to use you and utilize your services in some other employment? A. No, they did not.

The Court: I think we will adjourn for the noon intermission now. It is 12:00 o'clock and we shall adjourn until two o'clock this afternoon.

(Whereupon, at 12:00 o'clock noon, a recess was had until two o'clock p.m. of the same day.) [31]

Los Angeles, California, Monday, October 1, 1945

2:00 P.M.

The Court: You may proceed, gentlemen.

Mr. Sheridan: Mr. McDonald, will you resume the stand, please?

DOYLE McDONALD,

called as a witness by and on behalf of the Plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Sheridan:

Q. Now, Mr. McDonald, going back to the altercation that you had with Tam on the date of July 9th, I believe. On that date will you state to the court what you had been ordered to do by Mr. Tam?

A. I had been ordered by Mr. Tam several days previously—I had not exactly been ordered. I suggested to Mr. Tam that we get the truck and move our equipment back to the bubble tower and Mr. Tam gave me—he said, “Well, take some of your coolies and go down and get the turnbuckles and the other equipment and bring it back.” He said, “You don’t need a truck for that.” I said, “That is a long ways to carry stuff, particularly iron when it is rather heavy.” And I said, “We have trucks—trucks are plentiful for that [32] so why not do it?” He said, “You don’t need it,” and just passed it off that way. Therefore, we didn’t go get the stuff because it was too heavy. It was out of reason to carry it.

(Testimony of Doyle McDonald)

Mr. Chance: I object to that last statement and request it be stricken as a conclusion of the witness.

The Court: It is a conclusion but of course the court has heard him, but is not going to consider it because it is a conclusion.

Q. By Mr. Sheridan: Mr. McDonald, in order to refresh your recollection as to the conversation you had, I will ask you to read from your deposition which was taken on the 19th of May, 1945, at Long Beach, California. Read on pages 25—start on page 25 at line 20—

Mr. Chance: Just a moment, if you please. I do not understand the purpose of this. Are you impeaching your own witness, Mr. Sheridan?

Mr. Sheridan: No. I am asking him to refresh his recollection as to the conversation that he had.

Mr. Chance: You are not asking him to testify from that?

Mr. Sheridan: No.

Mr. Chance: Let the record show the witness is refreshing his recollection by reading his own deposition taken several months ago in this action.

Q. By Mr. Sheridan: Have you read it? [33]

A. Yes sir.

Mr. Chance: What pages did he read from?

Mr. Sheridan: Page 25, starting with line 20 to the end of the page, and on page 26 down to the end of the first sentence on line 7.

Q. By Mr. Sheridan: Now, Mr. McDonald, in your deposition on page 25, commencing on line 20, you stated,

(Testimony of Doyle McDonald)

"Give me a truck and I will go out and get the buckles, I will run them down, get a lot of iron and stuff I need here." And

"Mr. Tam said,—"

You referred to him as "he". You said,

"He said, 'Carry them.' I said, I am not used to packing stuff across a 40-mile farm.' I said, 'That is a pack-horse's job, but,' I said, 'I will rustle them, if you will give me a truck.' He said, 'We will see about that later', so we went to putting these together, another section of this bubble tower, and as I went back up there, I still had to do a portion of my welding and burning, because the welders were sick at the time, that were on the job. That is tacking, not exactly welding. Tacking is holding your metal together and tacking your dogs, which they had welders that couldn't even tack a dog on." [34]

Is that statement true?

Mr. Chance: I object to that. I do not understand that counsel for plaintiff is entitled to either impeach his own witness or to read from prior testimony. If the witness tells his story one way in court it is up to counsel for the other side to impeach him by contradictory testimony.

The Court: I think that is correct. He may read his deposition to refresh his memory and then you can ask him after he has refreshed his memory this or that or whatever you have in mind.

Mr. Sheridan: My purpose was not to impeach the testimony of Mr. McDonald. He apparently forgot the point to which I was referring and I used the deposition to refresh his recollection so he could testify on the point.

(Testimony of Doyle McDonald)

Mr. Chance: That is improper direct examination, I submit, your Honor. The witness can testify but he cannot be coached or brought along by counsel.

Mr. Sheridan: I was not attempting to coach the witness. The deposition is a part of the evidence in this case.

The Court: I think I shall let him answer the question.

The Witness: Now your question, please?

Mr. Sheridan: Will you repeat the question?

The Court: The question is, did those things take place as you detailed when your deposition was taken?
[35]

The Witness: That is right, sir.

Q. By Mr. Sheridan: Now, Mr. McDonald, at any time after this conversation did Mr. Tam or Mr. Gratz or any other man in charge of your work make a truck available for you so the materials could be transported to the bubble tower for your use?

A. At one time, the first job, when we first started on the bubble tower he brought materials there in a truck.

Q. You are referring to Mr. Tam?

A. Mr. Tam, as requested and the types of materials and then he picked them up and as we went to the smokestack he brought the materials there in a truck.

Q. Now, Mr. McDonald, how far was the smokestack from the bubble tower?

A. A quarter of a mile would be a good distance.

Q. That is the approximate distance between the two?

A. Yes, that is the distance.

Q. These materials had been brought to the bubble tower and were transported from the bubble tower to the smokestack? A. By a truck, that is right.

(Testimony of Doyle McDonald)

Q. After they were transported there you worked on the smokestack, did you not? A. Yes, sir.

Q. After you had terminated your work on the smoke-[36] stack were those tools brought back to the bubble tower?

A. No, they were not. They were more or less left around miscellaneously and used by other fellows who were carrying on that work after I had set the base in taking over the job.

Q. After you went back to the bubble tower you requested Mr. Tam to get materials for you, did you not?

A. I asked him for material, yes.

Q. Were those materials ever given to you prior to your discharge?

A. Only what we went out and rustled here and there within a distance of four or five hundred feet. I had my coolies to carry in metal, piece by piece, and I burned it up and made my own material.

Q. And that is the way you accomplished the job of getting these sections together, is it?

A. That is right, outside of the key plates and they were not usable anywhere else but on the bubble tower.

Q. Well, were these key plates something that were made in the States and sent over to you to use as a tool?

A. They had some key plates there out of quarter inch metal but I explained to Tam that they were not sufficient in strength and through a period of time of showing him and trying to actually operate them they bent considerably, and he went down and made up key plates out of one and one- [37] eighth stock, which were sufficient to do the job.

(Testimony of Doyle McDonald)

Q. And it was those one and one-eighth key plates that actually did the job of bringing these towers together—these tower sections together?

A. That is the only thing that did the job.

Q. Now, Mr. McDonald, at any time during the time you were on the bubble tower had you been ordered specifically by Mr. Tam to join these sections of bubble tower by the use of a turnbuckle?

A. I had been ordered, yes.

Q. When you were ordered to use a turnbuckle in joining these towers, what did you do?

A. I told him that it wouldn't work. He insisted that it would, so I said, "All right, we will put them on." He gave me two. I put one on each side. We started to screwing them up and after a certain amount of screwing on the things the threads bound freezing the turnbuckle to where it would not operate successfully or would not operate at all.

Q. When that had been demonstrated to Mr. Tam what did you do after that in order to join the sections together?

A. I reverted back to key plates, the larger ones that I had ordered.

Q. When you used these key plates were you able to join the sections and successfully weld the sections? [38]

A. Yes. Otherwise, we could not have done the job had we not had key plates.

Q. If you were to have used turnbuckles alone would it have been possible to join these tower sections?

A. The turnbuckles he gave me it would have been impossible.

(Testimony of Doyle McDonald)

Q. Now, Mr. McDonald, for identification only, I submit for your inspection this instrument and will you tell the court what this instrument is?

A. This is a jaw-to-eye turnbuckle. This is the jaw and this is the eye. Then they have turnbuckles that are jaw-to-jaw and eye-to-eye and hook-to-hook, or vice versa. One turnbuckle turns one way and one will turn the other way. One is a left-handed thread and one is right-handed thread. They go apart by holding one end and turning the other or it can be pulled together as of that method. It is now parting. Now, by reversing that turn there it will pull them together. That is a turnbuckle operation. That is a quarter-inch turnbuckle.

Mr. Chance: It is not contended that is the size of turnbuckle that was being used on the tower at that time.

Mr. Sheridan: No. This is a quarter-inch turnbuckle, is it not?

The Witness: That is right.

Q. By Mr. Sheridan: What size turnbuckles did you [39] attempt to use on the bubble tower?

A. One-inch turnbuckles.

Q. In other words, the turnbuckles that were used on the bubble towers would be approximately four times this size in diameter, would they not?

A. Yes, sir.

Q. How much would the turnbuckles that you used on the bubble tower weigh?

A. They would weigh roughly, a rough estimate, they would weigh probably ten or twelve pounds apiece.

Q. How long would those turnbuckles be in length unexpanded?

A. When they are fully expanded I think you have approximately, about—anywhere from 18 to 24 inches.

(Testimony of Doyle McDonald)

Q. In other words, you could bring an article together over a 24-inch space if you were attempting to draw them together? A. Something on that order, yes.

Q. Now, Mr. McDonald, with a one-inch turnbuckle in your experience how much of a weight would you be able to pull together with the turnbuckle?

A. If you were pulling with a turnbuckle as it is meant to be used—it was manufactured by specified men for the purposes that turnbuckles are meant for pulling of cables, you could break a one-inch turnbuckle at 20 tons or [40] a fraction better. If you were working it as a working object pulling cable to a solid load you could get approximately, maybe, four and a half ton pull out of it at most.

Q. Well, if a four or four and a half ton pull is the most you could get efficiently out of the turnbuckles, is that the reason why it was impossible for the turnbuckles to pull 20 tons from each side or approximately a 40-ton load there in this instance?

A. We had in this instance two turnbuckles. You had a 20-ton load, approximately, to pull, and combining the two turnbuckles at the most they possibly would pull under the working conditions would be nine and a half tons.

Q. Well, in attempting to pull 20 tons with turnbuckles which would only pull nine and a half, what happened to the turnbuckles?

Mr. Chance: In this particular instance?

Mr. Sheridan: Yes.

Mr. Chance: At what time? Prior to the time he went to the smokestack?

Mr. Sheridan: This foundation has already been laid, counsel. He stated that on this occasion Mr. Tam had asked him to apply these turnbuckles; he applied them to

(Testimony of Doyle McDonald)

the bubble tower and he was using them in demonstrating that they would not work.

Mr. Chance: That was prior to the time he went to the [41] smokestack?

The Witness: Yes, sir. The thing that happened was as you went to your, what you would call more or less the maximum working point, the turnbuckles began to freeze or build up friction and heat within itself and the metal taking such a severe strain, and it will do that, then as it began to heat the threads begin to cut themselves in half or tear up the threads and you couldn't turn it any further because the friction became too great. It wouldn't pull any more.

Q. By Mr. Sheridan: In other words, you could not pull the sections together? A. That is right.

Q. Because the turnbuckles— A. Refused to—

Q. Froze or parted?

A. Froze and refused to function any further.

Q. After you had demonstrated that turnbuckles were unsuccessful what method did you use in order to pull these sections together?

A. We reverted to the original idea of heavier key plates, which we used.

Q. Did those key plates successfully cause the sections to go together so they could be welded and fitted up?

A. Yes. They were the only thing that was really successful in fitting up the sections. [42]

Q. During the time that you were assembling all the three sections of this bubble tower had you used key plates alone?

A. Key plates for pulling them up. We used clips and dogs for the fairing of them and key plates for the pulling of them together.

(Testimony of Doyle McDonald)

Q. Now, Mr. McDonald, with reference to July 9th, I think, 1944, when you had this altercation with Mr. Tam at approximately 2:30 in the afternoon, what progress had you made in joining the one section with the other three sections prior to Mr. Tam's arrival?

A. We had some of our key plates there on the job and we had the crane there at approximately 15 minutes of two, and easily at two o'clock they had the large sections swinging in the air, coming together under the directions that I gave them where to place it and how to place it, and slightly after two we were welding the key plate dogs onto the bubble tower proper, and after about 15 minutes I had two of them secured and pulled up close enough to release the crane for the night to go home, which I had been directed to do.

Q. Well, was this bubble tower section secure and the dogs tied on at the time Mr. Tam approached you on this afternoon of July 9th?

A. Yes, it was finished.

[43]

Q. Was that added section of the tower in such condition that the crane could have been cut away and would no longer be needed?

A. The crane wasn't being needed then. It was through.

Q. What was left to be done in order to complete the tying on of this extra section of the bubble tower to the main tower?

A. To complete the tying on was coming back the next day and putting on a series of key plates anywhere from 18 to 24 all the way around, and start bringing it up into position, closing approximately that one inch gap that was left, closing it up, fairing it up, setting it up for inspection.

(Testimony of Doyle McDonald)

Q. But so far as getting the tower sections together securely enough to permit the crane to leave, there was nothing more to be done?

A. That which I had been ordered to do was done and it was finished.

Q. And that was done before Mr. Tam arrived on the scene? A. That is right.

Q. When Mr. Tam arrived, what if anything did he say to you?

Mr. Chance: Object to that as already asked and [44] answered.

The Court: I think he has covered that.

Mr. Sheridan: Very well.

Q. When Mr. Tam arrived did he inspect the bubble tower section that you had just put up?

A. Yes, he looked at it.

Q. Was he satisfied with the way that the sections were joined together?

Mr. Chance: Object to that as calling for a conclusion of the witness.

Q. By Mr. Sheridan: Did Mr. Tam order you to do anything other than what you had done when he arrived at the scene? A. (No answer.)

Mr. Chance: Object to that as having been asked and answered. He told him to get the turnbuckles.

The Court: He may answer it.

The Witness: He ordered me to go get the turnbuckles. I told him that we had it all set—that it was not necessary, and he said, “Well, where are the turnbuckles?” And I said, “They are down at the smoke-stack,” and from then on more or less the argument became heated and he eventually told me I was fired.

(Testimony of Doyle McDonald)

Q. By Mr. Sheridan: Were there any coolies present at the time of this conversation? [45]

A. There were no coolies present. They had left the job when the whistle blew. That was two o'clock. This happened about 20 minutes after two o'clock.

Mr. Sheridan: That will be all, Mr. McDonald.

Cross-Examination

By Mr. Chance:

Q. The crane was at the location of the bubble tower on the afternoon of July 9th, when you had this altercation with Mr. Tam, was it not? A. That is right.

Q. And there was a crane operator there operating the crane?

A. Yes, there was a crane operator there.

Q. And did he have a rigging crew there also with the crane?

A. There were one or two riggers that was considered a crew, yes.

Q. And they were just standing around at the time Tam came there, were they? A. Yes, they were.

Q. And they were not helping you?

A. No. Their work had been finished.

Q. But they were just standing there with the crane?

A. That is right. [46]

Q. At the time Tam came up?

A. That is right.

Q. They had not left even though their work had been finished?

A. I was the one to determine that. I knew it was finished.

(Testimony of Doyle McDonald)

Q. The slings were still around the section and attached to the crane at the time when Tam arrived?

A. They were around the section but they were not tight. They were hanging slack. They were waiting for Tam to come and say to turn them loose.

Q. So it was up to Tam to decide whether the crane had finished its job that afternoon or could be turned loose to go to work on another job the next morning?

A. Presumably so. After all, he was the foreman.

Q. And the crane had this sling or two slings around the 20-ton section and had the weight of it off of the ground, is that correct?

A. That is not correct.

Q. Had the weight of it off of the cribbing?

A. No, that is not correct.

Q. When you had been working on the weld plates had the weight been lifted off the section by the crane?

A. You will pardon me, but I don't understand what "weld plates" are. [47]

Q. You have been talking about key plates?

A. Key plates.

Q. When you were working on the key plates had the weight been slightly taken off the section by the crane?

A. The section was—I can explain that more thoroughly. The section was as of the position that Mr. Sheridan is. The other assembled parts are in the position that you are. We had to pick it up with the crane and just merely turn with the crane and set it in place, secure it with two key plates. It was in place. All the crane had to do was drop its slings. It had dropped its weight. The slings were loose. All they had to do was turn their slings loose and get away.

(Testimony of Doyle McDonald)

Q. Now, when you use turnbuckles on assembling two sections of this character of the bubble tower or vessel, isn't it a fact that you use a crane in conjunction with the turnbuckles to keep the weight slightly off the section in order to raise it just slightly off the ground, isn't that correct? A. That is wrong.

Mr. Sheridan: Object to that question. There is no evidence here that you do use turnbuckles in this type of work to properly get the sections together.

The Court: The witness answered the question.

Q. By Mr. Chance: At the time you state you were [48] giving a demonstration to Mr. Tam before you went down to the smokestack as to why turnbuckles would not function in the assembly of sections of this character, was there a crane being used at the same time to keep the weight of the section off of the ground when you were demonstrating the bringing of the two sections together by the turnbuckles? A. No, there was not.

Q. No crane there at all? A. No, sir.

Q. Wasn't the normal practice on the island, to your knowledge, to use turnbuckles to bring these sections together and at the same time have a crane there to keep the weight slightly suspended off the ground?

A. On the island. Anywhere I have ever worked it was not normal practice to use turnbuckles for pulling heavy loads. They are not made for that and they will not function as such.

Q. Even when you have a crane and jacks for use in conjunction with it? A. No.

Q. When you arrived at the island on May 28, 1944, you were assigned that same day or the following day to

(Testimony of Doyle McDonald)

go to work on the bubble tower under the supervision of Mr. Tam as a boilermaker; is that correct?

A. I believe that is correct. [49]

Q. And that bubble tower was a part of one of the sections or units going up as a part of the catalytic cracker unit, is that correct?

A. That would come under an engineer. I don't know that much about it.

Q. And at the time you were assigned on May 28th to work on this bubble tower there was one other boilermaker with his coolie crew also working on the same bubble tower, was there not?

A. That is wrong.

Q. Wasn't there a Mr. Christianson who was also a boilermaker and working on the bubble tower and working with you several weeks after you were assigned to that job?

A. That is wrong.

Q. Christianson never worked with you?

A. I don't even know Christianson. I never met him in my life.

Q. When you first went on the bubble tower were there any of the sections already joined or assembled or were all the sections un-assembled at the time you first went on that job?

A. They were laying around, as I previously explained, different sections, where the crane could pick them up and lay them in place. There had been none of it assembled.

Q. None of them had been assembled? [50]

A. No.

Q. Now, you were working on the bubble towers for a couple of weeks, possibly two weeks, I believe you said, after you were assigned to that job on May 28th; is that right?

A. I believe so, I believe that is right.

(Testimony of Doyle McDonald)

Q. And you assembled three sections of the bubble tower before you were taken off the bubble tower the first time and transferred to the smokestack; is that right?

A. (No answer.)

Q. Or were there four?

A. To be exact, I would not say. It could be two, three, or I had started on the fourth plus the base ring, which was also a section within itself.

Q. And at the time that you were working on assembling these three or four sections before you went down to the smokestack, you had a crew of Arabian laborers that you call "coolies" working under you, did you not?

A. I did not assemble these sections to that extent before I went to the smokestack.

Q. You did not answer my question. I will reframe it.

A. Excuse me.

Q. Perhaps it was not clear. You had a crew of Arab coolies working under you when you were assembling these [51] sections of the bubble tower before you went down to the smokestack?

A. Yes, at times in varying degrees or numbers.

Q. And how many did you have? Four or five Arabs in the crew usually?

A. I had at times—at times I had as high as five, but normally about two.

Q. From two to five? A. That is right.

Q. Arabs working for you? A. That is right.

Q. And they did the manual work of lifting and carrying things and working under your direction generally; is that correct? A. No.

Q. What did they do?

A. They were there to go get rods or help a welder or pull a hose. When we refer to a "hose" we mean a

(Testimony of Doyle McDonald)

lead from a welding machine; or to carry something or pick something up. They are a very weakly type of persons. Twenty-five pounds is a terrific load for them.

Q. But they were there to carry things in general and do the manual labor, is that correct?

A. No. I did the manual labor myself.

Q. The Arabs never did the manual labor, is that it?
[52]

A. They did part of it which they could do, which was very little.

Q. And that was what their job was, though, wasn't it, to do the manual work of picking up and carrying things and helping you men with skill and experience; isn't that correct?

A. Assisting in any way they were capable of.

Q. Now, towards the end of the second week that you were working on this bubble tower, after you had been first assigned there on May 28th, at the end of a couple of weeks the welders that were available there—there became a shortage of them and the welders working on these sections were transferred out to some other job; were they not?

A. One of them, one welder particularly, a big tall fellow—I never knew his name. He went to driving a water wagon. He said it was easier work and he would rather do it.

Q. But at the end of the second week the welders that were on the job were pulled off, is that correct, that were on the bubble tower job?

A. No. The other welder got sick and went to the hospital.

(Testimony of Doyle McDonald)

Q. There was a shortage of welders on the bubble tower at the end of the second week, is that correct?

A. That is right. [53]

Q. And as a result of that Tam asked you to go down and work on the base of the smokestack at another unit, is that correct?

A. He asked me to go to work on the smokestack.

Q. He wanted you to work on the base of the smokestack, the setting of it? A. That is right.

Q. And you took your crew of Arab coolies down there with you to assist you in the setting of that base of the smokestack? A. Yes, the two of them.

Q. And you worked down there on the smokestack for approximately two weeks, is that correct?

A. Roughly speaking, yes.

Q. And this Arab crew was with you during that period of time you were down at the smokestack?

A. Yes, sir.

Q. And then, let me see, two weeks from May 28th would be about June 15th, roughly speaking, around there, and two weeks from that would be around the end of June, so that we have brought the calendar down to about the end of June, haven't we, when you were down on the smokestack, is that right? I don't want to pin you down to dates.

A. Roughly speaking, just roughly speaking.

Q. Could have been a few days one way or the other? [54] A. That is right.

Q. Now, let me see. I believe that you were ill for a couple or three days in the first week of July, were you not? A. That is right.

(Testimony of Doyle McDonald)

Q. You were hospitalized there?

A. That is right.

Q. And that was about July 4th or 5th you were hospitalized and you came back to work shortly after the 4th of July, isn't that about right?

A. I believe that is right.

Q. And then when you came back from the hospital you went back to the smokestack, did you, or did you get transferred by Tam immediately back to the bubble tower? Do you remember?

A. That is pretty hard to recall.

Q. You don't remember whether you went back to the smokestack from the hospital or whether you went over to the bubble tower?

A. No, I don't.

Q. In any event, you were back on the bubble tower after a matter of from two to four or five days?

A. Roughly speaking.

Q. After you came back from the hospital?

A. Roughly speaking, yes.

Q. Somewhere between two, three, four or five days? [55]

A. Yes.

Q. You had finished the work you were doing down on the smokestack and you had been to the hospital and come back and then you were put back on the bubble tower in assembling the sections. You would be about on the fourth section when you came back to the bubble tower, is that right?

A. I am not positive on the amount of sections, but it was the next section to be assembled.

Q. Might have been the third, fourth or fifth section?

A. Could not have been the fifth. It possibly was the third or fourth.

(Testimony of Doyle McDonald)

Q. And you had your Arab crew of coolies back with you at the bubble tower when you first came back after you got out of the hospital, is that correct?

A. Two of them, yes.

Q. Two of them only? A. That is right.

Q. And they were working with you steadily from say the fourth or fifth or sixth of July down to the 9th of July, when you went back to the bubble tower, is that correct, during the regular hours? A. That is right.

Q. Now, you say that Tam gave you an order a couple or three days before July 9th, the date of this last [56] altercation you have related with him, and told you to go down and get the turnbuckles and get everything ready, and you told him that if he would let you have a truck you would do so, or something to that effect, is that correct?

A. I made the request for the equipment and a truck.

Q. And he told you to get the turnbuckles at that time, did he?

A. He said we could carry them and I told him it was a little tough on a man to carry stuff across a 40-acre farm of such weight.

Q. Let me ask you this. He ordered you to bring turnbuckles to the site of the bubble tower a couple or three days before July 9th, is that correct? A. Yes.

Q. And at that time you had at least two coolies working under you and available to carry that equipment for you or assist you in doing it, two or three days before July 9th, is that correct?

A. Yes, that is right.

(Testimony of Doyle McDonald)

Q. But even so, you refused Tam's order to get the turnbuckles two or three days before July 9th, is that correct?

A. He said, "Wait and we will see." I did not refuse his order.

Q. Isn't it a fact, Mr. McDonald, that these turn- [57] buckles that we are talking about had been on the site of the bubble tower just prior to the time when you went down to the smokestack about the middle of June for that assignment on the smokestack, isn't that correct?

A. That is right.

Q. And isn't it also correct that those turnbuckles were taken with other equipment from the bubble tower site down to the site of the smokestack for use on the smokestack? A. That is wrong.

Q. Where did the turnbuckles at the bubble tower go to?

A. They were taken to the smokestack—100 yards away from the site of the smokestack where it was lying on the ground dis-assembled.

Q. That is the turnbuckles were dis-assembled?

A. Where the smokestack was dis-assembled, a portion of it.

Q. And so the turnbuckles were taken from the site of the bubble tower somewhat about the middle of June when you were assigned down to the smokestack, and were taken down to the site of the smokestack, is that right?

A. The turnbuckles were never taken to the site of the smokestack.

Q. Well, to a place about 100 yards from the smokestack then? [58] A. Approximately so.

(Testimony of Doyle McDonald)

Q. And were they used down at the smokestack or in the vicinity of the smokestack in its assembly?

A. Not while I was assembling the smokestack, no.

Q. What were they taken down to the site of the smokestack for?

A. They were not taken to the site of the smokestack.

Q. Or in the vicinity of the smokestack?

A. Some other fellows were working over there with them.

Q. Some other fellows were using turnbuckles, is that right?

A. That is what I was told. I did not go over to see.

Q. Were they assembling tower sections?

A. No, they were not.

Q. And isn't it a fact that this smokestack or the position where the sections of the smokestack were being assembled by you or these others, sometime during the latter part of June, was, roughly speaking, between 100 and 300 yards distant from the site of the bubble tower where you were assembling the bubble tower sections?

A. Approximately a quarter of a mile.

Q. About a quarter of a mile? A. Yes.

Q. How many city blocks would you say that was, taking [59] the distance of a city block right here in front of the City Hall down to the left or down south of the Federal Courthouse Building, visualizing the length of that city block in front of the City Hall. Was it one city block or two city blocks or three city blocks? How many would you estimate?

A. Well, a rough estimation on the basis of 5,280 feet are a mile, it might possibly be a block and a half. My conception could be wrong.

(Testimony of Doyle McDonald)

Q. In other words, it was the distance of about a block and a half? A. A long block and a half.

Q. The size of the block out in front of the City Hall, right in front of this courthouse building?

A. I never noticed the block particularly. I don't live here.

Q. It is a fair size block. It is not a short block. You have not noticed that so you could not say?

A. No, I haven't.

Q. But in any event it would be about a block and a half of a good size city block, is that about it?

A. I don't know. It would be a quarter of a mile, approximately. As far as a block is concerned, I just couldn't say because I never stopped to judge it to that extent. I would say roughly a long block and a half. [60]

Q. Now, the turnbuckles that Tam ordered you to get two or three days before the July 9th altercation and likewise on July 9th, were situated down in the vicinity of that smokestack, isn't that correct?

A. That is right, I suppose.

Q. And they were actually kept in a tool box that was near—within a few feet of the smokestack, isn't that correct?

A. There were no tools that I ever had or any tool box that I ever saw on the job where we and our tools were involved.

Q. There was no tool box down near the smokestack in which these turnbuckles were kept at the time you were ordered to get them? A. Not in this vicinity.

Q. No tool box at all down near the smokestack, that is your recollection? A. Not for our equipment.

(Testimony of Doyle McDonald)

Q. Was there any at all down there?

A. I didn't recognize or look for any other because that wasn't our part.

Q. You don't know whether there was a tool box down near the smokestack then? A. I beg your pardon?

Q. You don't know whether there was or was not a tool [61] box down near the smokestack then?

A. I asked for equipment to be stored and he said, "Throw it inside, in the base, it will be there in the morning when you come back."

Q. Will you answer my question? Will you please read the question, Mr. Reporter?

(Question read.)

Mr. Chance: I move to strike the answer as not being responsive.

The Court: I don't think the answer is responsive.

Q. By Mr. Chance: Will you answer the question?

A. What was the question?

Q. You don't know whether or not then there was a tool box down near the smokestack at Bahrein Island at this time?

A. No, there wasn't for our equipment.

Q. Was there any for turnbuckles—in which turnbuckles were kept?

A. There were no turnbuckles near the smokestack where we were.

Q. Let us get this straight. The turnbuckles had been taken from the bubble tower site and had been taken down near the smokestack, within some feet of the smokestack, about the middle of June when you were ordered from the bubble tower down to the smokestack, isn't that correct?

A. I don't know. We left the turnbuckles. [62]

(Testimony of Doyle McDonald)

Q. Did you leave them at the bubble tower site?

A. At the bubble tower.

Q. At the bubble tower site?

A. Yes. I had nothing further to do with them.

Q. So there were turnbuckles at the bubble tower site between the first and middle of June when you were working on the sections at the bubble tower, is that correct?

A. The first time I left there, there were turnbuckles at the bubble tower.

Q. And when you got back a few days before July 9th there were no turnbuckles at the site of the bubble tower, is that correct?

A. That is right.

Q. And Tam ordered you to go down to the vicinity of the smokestack and pick up two turnbuckles or have your coolies pick them up and bring them back to the site of the bubble tower, isn't that correct?

A. He did, but he rescinded the order.

Q. You say he rescinded the order?

A. Yes.

Q. Now it is a fact, isn't it, that on July 9th, when you had this altercation with Tam, when he, as you say, asked you where the turnbuckles were when he arrived at, sometime around 2:30 p. m. on July 9th, at the bubble tower site, that those turnbuckles were approximately a block and [63] a half, a city block and a half or as you say, a quarter of a mile from the bubble tower, and would have required you or the colliers, if present, to go down and pick them up and bring them a block and a half both ways, isn't that correct?

A. They were supposed to have been there, yes.

Q. And you have stated that these turnbuckles were one inch in diameter. That is, I take it the swivel screw was one inch in diameter and weighed between ten and 12 pounds.

A. Approximately so.

(Testimony of Doyle McDonald)

Q. So that would have required either you or your coolies to pick up two tools weighing from 10 to 12 pounds each, is that right?

A. I did send them after the turnbuckles at a later date, but they couldn't find them.

Q. At what later date did you send the coolies for the turnbuckles and could not find them?

A. At the time I returned to the bubble tower the second time.

Q. You did send some coolies down to look for turnbuckles after you came out of the hospital and came back to the bubble tower?

A. That is right.

Q. How many days before July 9th did you try to find turnbuckles with your coolies?

A. I don't recall, but I was preparing for the next [64] section and getting the turnbuckles as Tam had requested, but they couldn't find them. They came back and reported to me that they couldn't find them.

Q. You were going to use those turnbuckles if found by the coolies on assembling the next section of the tower?

A. It wasn't my intention; it was Tam's idea.

Q. Well, you were going to use them under his instructions then, were you, if your coolies found them and brought them back?

A. I was going to put them on as he suggested and asked me to do.

Q. At the time Tam came up to the section of the bubble tower that you were working on about 2:30 in the afternoon of July 9th, just before you—immediately before you had these words with him, will you tell us what you were doing at that particular time? I mean where you

(Testimony of Doyle McDonald)

were standing and what you were working at and what you were doing, please?

A. I was standing on the ground.

Q. You were on the ground?

A. On the ground.

Q. You were not up on the scaffolding or on the cribbing or anything?

A. I was on no scaffold or no cribbing. I had been working for approximately 20 minutes alone by myself with [65] my welder; he only did the welding.

Q. You had a welder there working with you, is that right?

A. He worked as a welder, not with me.

Q. He was working at the very same spot you were, was he?

A. He would work as I directed.

Q. He was working under your direction?

A. In the process of welding.

Q. Welding on a lug or dog, was he, or a clip?

A. He had completed his welding.

Q. What was he welding on?

A. He was welding on a lug to place the key plate on.

Q. What were you doing at that time?

A. I was holding it while he was welding it.

Q. You were holding the lug and he welded it?

A. But at the time Tam came up there I was standing on the—we had secured two key plates, wedged them securely, and brought the bubble towers within an inch of being finished or secured as Mr. Tam had asked us to do for the night to release the crane. The crane was standing there with the slings loose and I was standing waiting for him to make his next decision. Our job had been finished as directed by Mr. Vessels.

(Testimony of Doyle McDonald)

Q. Well, you were just standing around then when he [66] came on the site of the bubble tower at 2:30 or approximately 2:30 on that day, is that right?

A. I was standing there waiting for him to make his next decision.

Q. But when he arrived you were not doing anything?

A. We had just practically completed the job as he arrived.

Q. But the two sections were about an inch apart, is that correct? A. Approximately so.

Q. And being an inch apart they were not ready to weld, were they?

A. We were not instructed to get them ready to weld.

Q. But if you had put turnbuckles on and had the crane simply take the slack out of the sling, couldn't you have brought those two sections closer together that afternoon before 3:00 o'clock with the use of turnbuckles?

A. Before 3:00 o'clock.

Q. Yes.

A. We had it finished 20 minutes after two.

Q. You had it finished by bringing it within about an inch—bringing the two sections about an inch apart, is that correct? A. Yes, sir, that was our orders.

Q. Now, if you had carried out Mr. Tam's instructions [67] and had gone and gotten the turnbuckles and put those on and had the crane take the slack out by just putting a little weight on the slings and lifting the 20-ton section up a bit, those two turnbuckles would have brought those two sections closer together than one inch, would they not? A. I don't believe so.

Q. But that is what Tam ordered you to do, wasn't it? A. No, he didn't.

(Testimony of Doyle McDonald)

Q. What did he want you to get the turnbuckles for?

A. He told me to get the turnbuckles and he said, "Well, we will see later," and he never since, until he came back to the job at 20 minutes after two, he had never ordered me since then that—he said he would see about it later.

Q. That was at 2:30?

A. Then he asked me about them.

Q. At 2:20 or 2:30 he asked you where the turnbuckles were and you said you didn't have them and he told you to go and get them but you did not do so. If you had gone and gotten them and brought them back what did he want you to do with them, the turnbuckles?

A. He didn't tell me to go get them.

Q. Now in your deposition on May 19, 1945, in this case, at page 25, and I read and I am going to ask you if it is not correct that you so testified:

" 'Where in hell are your turnbuckles?' I said, 'I told you the other day to give me a truck and I [68] would gather those up, and you put it off. He said' meaning Tam,

" 'I want turnbuckles on there, and I want them on there right now.' I said, 'You had better grow them. Then we can put them on.' One word led to another, so he squared off as though he were going to hit me, and I backed off. I was going to pick up a club and protect myself, but he said, 'You are through, get off the job.' "

That is your testimony on May 19th of this year, isn't that correct?

A. If it is out of that deposition, that is correct.

(Testimony of Doyle McDonald)

Q. So when he said he wanted the turnbuckles on there you told him he had better go and grow the turnbuckles, isn't that correct?

A. Because we had tried previously, several days before, to find them and couldn't.

Q. If you had been able to find turnbuckles and bring them to the site of the bubble tower that afternoon of July 9th, what did he want you to do with the turnbuckles, to your knowledge?

A. If we could have found them or he had brought them, or they were there, I would have put them on as he wanted them on there.

Q. You would have put the end of one turnbuckle [69] attached to a lug or dog or clip welded on one of these sections, on the last section, and you would have put the other end of the turnbuckle attached in one way or another to a lug, clip or dog welded on the adjoining section of the bubble tower and you would have had the weight of the crane—you would have had the weight of the section lifted by the crane and you would have turned or caused or had someone else help you turn those screws and bring the bubble tower section that much closer together, isn't that right?

A. We tried it and it didn't work.

Q. You mean to say that if you took the weight, just took the weight off of this 20-ton section of steel tubing by having the crane pick up the slings with a hoist and just take the weight of the section off the ground and then put the pressure on these turnbuckles by turning the turnbuckles, that those two sections would not have come closer together? Do you mean to say that?

A. If everything was to precision point I don't know whether it would have or not, but the crane never released

(Testimony of Doyle McDonald)

the pressure on the turnbuckle. One was always in a bind or the other one was. This is heavy loads that you are working with. You must conceive 20 tons against a 60-ton object is heavy and a one-inch turnbuckle is not a tool for bringing stuff in line like that and it never was.

Q. Mr. McDonald, you testified, I believe, that according to the manufacturer's catalog, which I believe you referred to, that a one-inch turnbuckle weighing between 10 and 12 pounds with a one-inch diameter on the swivel screw, which would be expanded to from 18 inches to 24 inches, that is, between a foot and a half and two feet, would pull a pressure of approximately 20 tons on a cable. Was that the purport of your testimony on direct examination?

A. No. I said working loads.

Q. A working load?

A. I definitely said a working load.

Q. Now, if you had the crane take the weight of this 20-ton section, just lift it off the ground, just to get the weight off of it—I do not mean to suspend it in the air a foot or two, but just have the crane take the load off the ground slightly by putting the pressure on the slings and just suspending it slightly that then these two turnbuckles, if attached to the two sections would have been unable to bring that new section into closer juxtaposition of the old section than one inch? Do you mean to say that?

A. The perfection of such tremendous loads under those conditions are not workable. They never were and they never will be. You are assuming down to precision points which you don't have in a crane. There is the spring of the cable, the spring of the boom; the wind blowing, blocks, the unevenness of the ground and a heavy piece of metal you [71] are handling. You are referring

(Testimony of Doyle McDonald)

to precision instruments. You are not referring to construction work.

Q. Mr. McDonald, do you want to leave the impression that the only instruments that you used in assembling sections 1, 2 and 3, and 4, if there was a fourth one, of this bubble tower, between the end of May and the 9th or 10th of July, was done with key plates and wedges?

A. Key plates, wedges, dogs and clips.

Q. Did you use any hydraulic packs?

A. We started to use a hydraulic jack. It was broken and we couldn't use it.

Q. You mean to say you had only one hydraulic jack available on the island for this one particular bubble section?

Mr. Sheridan: That was not his statement. I object to that.

Mr. Chance: I will withdraw the question, Mr. Sheridan.

Q. Was there only one hydraulic jack of sufficient weight on the island at that time that you could use on this bubble tower?

A. I don't know. I asked for a hydraulic jack at one time and they said there wasn't any available but there was one and it was broken.

Q. What was the size of it? What was the pressure of that particular one you say was broken?

A. Of that hydraulic jack? [72]

Q. Yes.

A. It was a 10-ton hydraulic jack.

Q. Isn't it a fact, though, that you had several jacks around the site of this bubble tower and were using them in assembling these sections of the bubble tower?

A. There was not.

(Testimony of Doyle McDonald)

Q. Only the one? That was the broken one, is that correct? A. That is correct.

Q. You have to get the two sections of a tower of this size for purposes of catalytic cracking units close together, closer together than one inch in order to weld them, don't you—weld them together and make them one continuous tower when erected?

A. You are referring to the final fit-up?

Q. Yes. A. Yes.

Q. On a final fit-up within what fraction of an inch must you bring the new section in juxtaposition of the already assembled sections of a bubble tower of this size in order for the welders to go to work?

A. Roughly—I cannot remember, but it would have been from 1-16th, maybe to 3-16ths. I believe the shims were 3-16ths, but I am not positive.

Q. So that the two sections had to be brought closer [73] together either that afternoon or the next morning than one inch in order for the welders to go to work on it, isn't that correct?

A. We were only supposed to secure it for the night and release the crane.

Mr. Chance: Would you read the question?

(Question read.)

The Witness: I did not understand you.

Q. By Mr. Chance: Let me state the question this way. It is a fact that this fourth section, if it was the fourth, had to be brought closer to the end of the third section that had already been assembled to the preceding sections than one inch either that afternoon of July 9th or the next morning, or sometime, in order for the welders to go to work and weld the sections together?

A. In the process of assembly, yes, sir.

(Testimony of Doyle McDonald)

Q. Had to be brought down to 1-16th or 3-16ths of an inch distance between the ends of the two sections in order for them to be welded together, isn't that correct?

A. That is right.

Q. So that afternoon you only had them within about one inch of each other, the two sections?

A. Approximately so, yes.

Q. How were those sections to be brought closer together than the one inch either that afternoon or the next [74] day or whenever it was? By what means would you bring them closer together?

A. By key plates and wedges.

Q. Would you need the crane in order to bring them closer together with key plates and wedges?

A. We were through with the crane. We didn't need it.

Q. Would you need a crane in order to bring the two sections together closer than one inch by means of key plates and wedges?

A. No. We would never need the crane any more.

Q. What position was that section four in on the ground at the time the crane came there at a quarter of two on July 9th? Where was its position in relation to the three sections that had already been assembled?

A. Well, it would be, roughly I would say it was—all the crane had to do was whirl around in that position and pick it up and whirl back around and let it down in place.

Q. So it was some number of feet—the fourth section was some number of feet away from the three sections already assembled when the crane came there in the afternoon, at about a quarter of two the afternoon of July 9th?

A. I guess that is right.

(Testimony of Doyle McDonald)

Q. Now, on the afternoon of July 9th at about 2:30 p. m. when Mr. Tam came up to you, it was a fact, was it not, that you were actually standing on a scaffold or on the [75] cribbing and were not standing on the ground at that time? A. I was standing on the ground.

Q. At that time the crane was there, there was a crane operator and there were one or two crane riggers; there was this welder that you say had just been helping you. Now, there was also a man by the name of Einer Arhendt present at that time near the bubble tower, isn't that correct?

A. He was setting over in the shade under a canopy that they had built there. He is a welding inspector for somebody. I don't know, but he was inspector on that particular job.

Q. How close was he to where you were standing near this fourth section of the bubble tower when Mr. Tam came up on the scene about 2:30 in the afternoon of July 9th? A. Roughly I would say 25 or 30 feet.

Q. Twenty-five or 30 feet away? A. Roughly

Q. So when you had this conversation with Einer Ahrendt that you talked about on your direct examination, he was about 25 or 30 feet away from where you were standing near this section, is that correct?

A. Mr. Einer?

Q. Yes, I am talking about Einer Arhendt.

A. When I was talking to Tam?

Q. No. Let me repeat that question. You said that [76] you went over and had a talk with Einer Arhendt, the welding inspector, after you had this, your last conversation with Mr. Tam that afternoon. You testified to that on your direct examination. Do you recall that? A. Yes, I do.

(Testimony of Doyle McDonald)

Q. And Einer Arhendt was standing in the same place after you got through with your talk with Mr. Tam as he was when Mr. Tam came up on the scene, under this canopy?

A. Prior to that time I don't know where Mr. Einer was but when I left he was there where I spoke of.

Q. Under the canopy?

A. Under the canopy, yes.

Q. And that you say was 25 or 30 feet from where you were standing when Mr. Tam came up?

A. Roughly so.

Q. Was Mr. Arhendt within hearing distance of the conversation that you had with Mr. Tam that afternoon?

Mr. Sheridan: That calls for a conclusion of the witness.

Q. (By Mr. Chance): What would be your opinion on that? (No answer).

Q. I will withdraw the question.

The Court: He may go ahead and answer the question. He may express his opinion.

The Witness: You speak of Mr. Arhendt. Mr. Einer was [77] where he was. I don't know when I left—when I left he was where I said, under the canopy.

Q. By Mr. Chance: All right. And that was 25 or 30 feet away from where you had been standing?

A. Roughly so.

Q. Now, it was after Mr. Tam ordered you to get the turnbuckles around 2:30 p. m. on July 9th and after you had refused to go and get those turnbuckles—that is, after you told him “Go and grow them,” that one word led to another and as you have testified in your deposition, he squared off as though he was going to hit you and you backed off and you were going to pick up a club and pro-

(Testimony of Doyle McDonald)

tect yourself, that he, according to your testimony in your deposition, said, "You are through, get off the job." Is that correct. A. Well, he intimated at—

Q. Just answer the question.

A. I recall that he told me I was fired. I recall he told me I was through.

Q. Will you answer the question?

A. Yes. I misunderstood your question. Would you repeat it, please?

Mr. Chance: Will you read the question?

(Question read.)

The Witness: Judge, your honor, I never refused to go get the turnbuckles. [78]

The Court: You may break down your answer in order to answer the question. You may answer it in the affirmative or negative and then explain the question if you desire. It is rather involved.

The Witness: I never refused to go get the turnbuckles.

Mr. Chance: I will withdraw the question and ask it this way. I will let the record stand as it is.

The Court: Anything further from this witness?

Mr. Chance: Yes, your honor. I have some additional questions. I think I am going to have to ask the indulgence of the court and counsel. I mentioned this to Mr. Sheridan and he very courteously agreed, if your Honor will do so, to permit me to defer the completion of my cross examination of the plaintiff and put on a witness that has come down from the north and who has to leave tonight. He very courteously came down so that we could conclude his testimony before the close of the day. Would your Honor be good enough to permit me to put him on out of order as a part of my case? He is Mr. Tam, the foreman, concerning whom there has been some testimony.

(Testimony of Doyle McDonald)

The Court: Yes. We will take our afternoon intermission. But before you put your witness on and since you are going to ask that he be excused and will not be subject to being recalled for rebuttal, I think you had better clear up the matter that was indicated in your last question. If [79] neither side wants to ask it the court will on his own motion. I would like for the witness to again detail just exactly what took place preceding the time when Mr. Tam said to the witness, "You are fired." I understand the difficulty between the witness and Mr. Tam. The major difficulty was the difference in procedure in bringing these sections together, but Mr. Tam was your boss.

The Witness: That is right, sir.

The Court: Now then, just what took place?

The Witness: I had previously, several days before, asked the coolies to go get the turnbuckles. They couldn't find them. Then on this point Tam came around and he said, "Where are the turnbuckles?" I had completed the job. It was finished.

The Court: The 8-hour shift was over and your coolies had left?

The Witness: They had left 20 minutes before and I had completed the job. It was finished. I said to Mr. Tam, "You will have to grow the turnbuckles."—meaning that they were lost, and he said, "Well, I want turnbuckles on there," and I at no time refused to go get the turnbuckles for the fellow, but you can't get something that you can't find.

The Court: I don't want you to argue about it. What else happened?

(Testimony of Doyle McDonald)

The Witness: Then he got pretty rash and so did I, [80] more or less. There were no blows struck. Eventually he said, "You are fired, get off the job," and that was all there was to it, outside of my walking by this Mr. Einer, the welding inspector, and shaking hands with him and telling him goodbye.

The Court: We will take an intermission now for 15 minutes and then you may put on your witness out of order.

(Short recess.)

The Court: You may proceed.

Mr. Chance: Mr. Tam, will you take the stand?

LEON J. TAM,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct-Examination

By Mr. Chance:

Q. Will you state your name?

A. Leon J. Tam.

Q. Mr. Tam, what is your present residence?

A. Present residence?

Q. Yes. A. San Francisco.

Q. Do you want to give us the street address, your [81] present residence address?

A. 801 53rd street, Oakland, right now.

Q. Oakland, California? A. That is right.

Q. And what is your occupation?

A. Boilermaker foreman.

(Testimony of Leon J. Tam)

Q. And for how many years have you been a boiler-maker or boilermaker foreman?

A. Boilermaker foreman about 35 years.

Q. Do you belong to a boilermakers' union?

A. That is right.

Q. What union is that? A. A. F. of L.

Q. A. F. of L. Boilermakers' Union?

A. That is right.

Q. For what period of time have you been a member of the A. F. of L. Boilermakers' Union?

A. Oh, around 25 or 26 years or more.

Q. Are you presently a member of the union?

A. I have a withdrawal—I am still a member.

Q. And what experience, if any, have you had in oil refinery construction work?

A. Around 17 years.

Q. What companies have you worked for?

A. Standard Oil Company. [82]

Q. Refinery construction work?

A. Standard Oil Company of California.

Q. During what period of time did you work for Standard Oil of California in the refinery construction business as a boilermaker foreman?

A. As a foreman?

Q. And as a boilermaker?

A. 1924 to 1943 for the Standard Oil Company.

Q. And what positions did you hold with them during that period of time, 1924 to 1943?

A. Boilermaker layer out, construction foreman, shop foreman last five years and a half at Richmond.

Q. Richmond, California? A. That is right.

(Testimony of Leon J. Tam)

Q. That is the plant of the Standard Oil Refinery, is it not? A. That is right.

Q. And during that period of time it was in connection with construction and repair work in and about the refinery? A. That is right.

Q. Have you worked on and about the construction of large towers and vessels and tanks that go to make up oil refineries? A. That is right.

Q. What type of boilermaking experience would you say [83] that you have had as a general proposition?

A. All around boilermaker.

Q. What does that consist of, "all around boilermaker"?

A. Fitting up, welding, cutting, laying out, supervision.

Q. Did you work on the Bahrein Island in the Persian Gulf on construction work prior to the year 1943?

A. I did.

Q. For whom?

A. Bahrein Petroleum Company.

Q. Standard Oil of California and the Bahrein Petroleum Company, Limited? A. That is right.

Q. That is the Bahrein Petroleum Company, Limited, owned the oil concession on Bahrein Island, is that correct? A. That is right.

Q. And what work did you do for the Bahrein Petroleum Company prior to 1943?

A. I was boilermaker foreman.

Q. Boilermaker foreman? A. That is right.

Q. And what type of activity were you engaged in?

A. Putting up practically the same thing we put up—practically the same as this last one.

(Testimony of Leon J. Tam)

The Court: When was that? You said prior to this one. [84]

The Witness: Crude unit, stabilizers.

The Court: What year?

The Witness: That was 1936 and '37.

Q. By Mr. Chance: In 1936 and 1937 you worked on Bahrein Island? A. Yes, sir.

Q. As a boilermaker foreman?

A. That is right.

Q. For the Bahrein Island Petroleum Company, Limited? A. That is right.

Q. Was that in the construction of the first refinery unit on the Island?

A. Put up the first unit put up on the island.

Q. What size unit was that?

A. 10-000-barrel.

Q. That is, it would run 10,000 barrels a day?

A. That is right.

Q. Were you there from the beginning of that construction of the 10,000-barrel unit to the completion of it in 1936 and 1937? A. That is right.

Q. And you worked as a boilermaker foreman there then? A. That is right.

Q. Are you presently employed by any company?

A. No, sir, I am not. [85]

Q. By whom were you last employed?

A. Bechtel-McCone.

Q. During what period of time were you employed by Bechtel-McCone?

A. From December 7, 1943, to July 5, 1945.

(Testimony of Leon J. Tam)

Q. Was that by the defendant in this action, Compañia Constructora Bechtel-McCone, South America—the South American company? A. That is right.

Q. You were employed by that company during the period from December, 1943 to July, 1945?

A. That is right.

Q. Did you undertake a written contract with that company in December of 1943? A. That is right.

Q. What was the period of time of that employment contract?

A. Around seventeen and a half months. That was on the island.

Q. You were on the island? A. Yes, sir.

Q. Was it one of their 18 months' contracts?

A. That is right.

Q. And did you complete the performance of your work under that 18 months' contract? [86] That is right.

Q. Did you satisfactorily complete it so as to receive the bonus payment due thereunder for satisfactory completion of the contract? A. I sure did.

Q. And when did you return to the States after July, 1945? A. Arrived in the States July 26, 1945.

Q. That is, you returned to this country in July, 1945, July 26th? A. That is right.

Q. Are you about to engage in a venture of your own?

Mr. Sheridan: I object to that as immaterial.

Mr. Chance: I will withdraw the question.

Q. Were you on the island, Bahrein Island, during the months of May to July, 1944? A. That is right.

Q. And what was your position?

A. Boilermaker foreman.

Q. During the months of May to July, 1944?

A. That is right.

(Testimony of Leon J. Tam)

Q. Who was your immediate superior?

A. Ed Gratz.

Q. Ed Gratz? A. Yes. [87]

Q. What was his general position?

A. General boilermaker foreman?

Q. General boilermaker foreman?

A. That is right.

Q. And who was his immediate superior, if you know?

A. Walter Hillman.

Q. And who was Walter Hillman's foreman—strike that. What was his job

A. He was general superintendent.

Q. And who was immediately over Hillman?

A. Roy McAuliffe

Q. What was his position?

A. Project Manager.

Q. Did you have any authority conferred upon you by any representative of the company to discharge any men working under you while you were a boilermaker foreman on Bahrein Island?

A. I had no authority to discharge anybody.

Q. What was your authority in connection with men working under you?

A. If I had somebody that didn't do the work I could have them transferred to another job.

Q. But you did not have the authority to discharge them? A. No, sir. [88]

Q. That would have to be done by your superior?

A. That was done by my superior, yes.

The Court: By which one of your superiors? Was it one whom you have named?

The Witness: Yes, my immediate superior, Edward Gratz.

(Testimony of Leon J. Tam)

Q. By Mr Chance: That is the general boilermaker foreman who had that authority? A. That is right?

Q. But you did not? A. That is right.

Mr. Sheridan: Mr. Tam, will you kindly speak up?

The Witness: Yes.

Q. By Mr. Chance: What work was being done under your supervision from May to July, 1944—withdraw that question. Did you know Doyle McDonald?

A. I did. I met him at that time.

Q. Did he work under you? A. That is right.

Q. In what capacity?

A. Well, he was supposed to be a boilermaker.

Q. He worked as a boilermaker under you?

A. That is right.

Q. And when did he first come to work for you, do you remember?

A. I don't exactly know the date. I know it was May [89] sometime.

Q. 1944? A. That is right

Q. And how long did he work for you?

A. Around six weeks.

Q. What work did you first assign him to do when he was put under your supervision?

A. Well, when he first came to me I put him on a column with another boilermaker.

Q. On a column with another boilermaker?

A. That is right; assembling.

Q. What kind of column was this you put him on?

A. A bubble tower.

Q. And how long did he work on the bubble tower column after you first assigned him to it?

A. He worked on there a couple of weeks.

(Testimony of Leon J. Tam)

Q. Then what happened with reference to him?

A. We had to pull the welders off so we pulled him off and put him down assembling a stack.

Q. What?

A. Put him down on the crude unit assembling a stack.

Q. Assembling a smokestack? A. That is right.

Q. Did he work under you down at the smokestack?

A. That is right. [90]

Q. How long did he work down at the smokestack?

A. Worked on that a couple of weeks.

Q. Was he assembling sections or setting a base or what? A. Setting a base.

Q. Setting a base for the smokestack?

A. Yes. The base was in three sections.

Q. And then after a couple of weeks that he was on the smokestack what did he do.

A. Well, after he was on there a couple of weeks we had welders available for the tower so I pulled him off and put him back on the tower.

Q. Put him back on the same bubble tower column that you assigned him to originally?

A. The same one he left, yes.

Q. Now, did he have when working under you during the first couple of weeks on the bubble tower an Arab coolie crew? A. Coolie crew?

Q. Yes. A. Yes; had plenty of coolies.

Q. How many would you say that he had under him that you observed, under his direction, during the first couple of weeks on the bubble tower?

A. From four to six, anyway. [91]

(Testimony of Leon J. Tam)

Q. And when he was transferred down to the smoke-stack for those two weeks did he have coolies with him?

A. Had the same coolies with him down there.

Q. And had the same number approximately?

A. That is right.

Q. Would they vary from time to time, the number working under him?

A. Probably one or two, but always four on the job at all times.

Q. And when he was transferred back to the bubble tower after he worked on the smokestack did his coolies crew go back with him?

A. That is right.

Q. And how many did he have back there on the bubble tower when he went back the second time? The same number?

A. At least five, anyway.

Q. Had approximately the same crew?

A. The same crew.

Q. That is, the same men?

A. That is right.

Q. Same Arab natives, is that right?

A. The same Arab individuals were kept with him during the entire six weeks period.

Q. What were the duties of the Arab coolies, as you call them? [92]

A. Assigned as boilermaker helpers.

Q. What were they supposed to do in that capacity?

A. Anything the boilermakers asked them to do.

Q. Such as what?

A. Getting materials, getting tools. Helping the boilermaker on the job.

Q. Carrying tools if they were required to do so?

A. That is right.

(Testimony of Leon J. Tam)

Q. Now, will you describe as best you can recall, the condition of this bubble tower column when Mr. McDonald was first assigned to work on it toward the end of May? Can you describe it? Do you recall the condition of the sections of the bubble tower when you first put Mr. McDonald to work on it at the end of May?

A. When Mr. McDonald came there we had two or three sections assembled already and welded.

Q. You had two or three already welded?

A. That is right.

Q. That is to say, the first two or three sections of this bubble tower had already been assembled and welded together when McDonald was assigned to the work at the end of May?

A. That is right.

Q. And was there any other boilermaker working with McDonald when he was assigned and after he was assigned? [93]

A. That is right.

Q. To that bubble tower? A. That is right.

Q. How many boilermakers there?

A. McDonald and another one. Two of them together.

Q. Do you remember the name of the other boilermaker? A. Christianson.

Q. Christianson? A. That is right.

Q. And did he have a crew of Arab coolies working under him that were different from the crew under McDonald? A. He had his own coolies.

Q. How many in his crew?

A. He had four or five.

Q. Each boilermaker has four or five coolies assigned to him to work with him regularly?

A. We figured four or five coolies to each mechanic.

(Testimony of Leon J. Tam)

Q. And that was the general set-up all the way through? A. Yes, sir.

Q. Throughout the island, is that correct?

A. That is right.

Q. Now, did Mr. Christianson and McDonald proceed after he was first assigned to the bubble tower, to assemble additional sections? A. That is right.[94]

Q. To this column? A. That is right.

Q. And how many sections would you say were assembled during those first two weeks that McDonald was on the bubble tower after he came there?

A. I would say two or three sections.

Q. Two or three sections? So there were what—four, five or six sections? A. Assembled?

Q. Yes, assembled? A. That is right.

Q. By the time he was transferred down to the smoke-stack? A. That is right.

Q. Now, can you describe how many sections went into the completed bubble tower column that we are talking about here?

A. I believe there was about 11 sections. I am not sure.

Q. There might have been less?

A. No, there wasn't any less, I don't believe.

Q. And they were how long? What was the height of each section?

A. Well, they varied. They varied from 16 to 20 feet.

Q. From 16 to 20 feet? [95]

A. And 12 feet in diameter.

Q. Some would be 16 feet and some would be 20 feet in diameter or height?

A. 12 foot in diameter.

(Testimony of Leon J. Tam)

Q. So when the assembled column was put together and hoisted with a crane vertically it would have been—

A. About 152 feet. That is to the tip of the valve from the base.

Q. 152 feet from the base to the top of the tower when it was fully assembled?

A. To the tip of the valve.

Q. That is, the vessel was round on top—it was round at the top of the tower? A. That is right.

Q. Now, the job of these two boilermakers then was to assemble each of these two sections together?

A. That is right.

Q. Now, will you describe for the court the procedure that was followed during the first two weeks that McDonald was assigned to this bubble tower column, by himself and Christianson? A. Yes.

Q. In the assembling of those two or three sections that you have said were assembled during those first two weeks? [96] A. That is right.

Q. Tell the judge in your own words the process that was being used?

A. We had built a cribbing for it out of 2 by 12, eight of them on top of one another and nailed them and this section—these towers were laying horizontally and we would take the crane and put each section about three foot apart all along in line on one of the cribbing and we would start assembling them. We would get the crane and raise it and shove it up as close as we could get it and put two turnbuckles on to hold it and used key plates to fair it up. Then we had jacks there that we would put underneath. That would release the crane. We did that to lift it up a little bit or line it up. That was the procedure all the way through.

(Testimony of Leon J. Tam)

Q. So you used turnbuckles, key plates, jacks and the crane? A. That is right.

Q. For the assembling of each of these sections?

A. That is right.

Q. Can you state whether or not you observed Christianson and McDonald, and particularly McDonald, using turnbuckles along with wedges and jacks and the crane in the assembly of those first few sections he worked on at the bubble tower column before you transferred him down to the [97] smokestack? A. That is right.

Q. That is, he did use turnbuckles?

A. That is right.

Q. Together with these other instruments?

A. Used turnbuckles and come-alongs—key plates.

Q. What is a “come-along”?

A. A “come-along” is a sort of a ratchet wrench. It has a handle on it and two hooks on it, one on a chain and one on the end of the dog. It is the same as a turnbuckle although you do not turn it. You use a ratchet.

Q. Would you use that sometime instead of a turnbuckle? A. No, no,—turnbuckles and them.

Q. You use all four of them? A. That is right.

Q. That is key plates, turnbuckles, come-alongs and jacks? A. And the jack.

Q. Together with the crane? A. That is right.

Q. What was the function of the crane in assembling these sections together?

A. Well, we had to use the crane to take the weight off of the cribbing.[98]

Q. For what purpose? For what reason?

A. For assembling each section. They were about from three to four foot apart so we would raise them up just far enough off the cribbing so we could ease them

(Testimony of Leon J. Tam)

up to the other section after we had the lugs welded on and put the turnbuckles on to hold it there and wedge it up in place and release the crane. The crane was finished until we got ready for the next section.

Q. How long would it take to bring one section up to the other so that it was in place? How long would that take? A. Just in place?

Q. Put it in place before welding.

A. Before welding?

Q. Yes.

A. Oh, I would say after you had the lugs on probably a half hour.

Q. How long would it take for the boilermaker to do his job of bringing the section up and fairing it up and getting it ready for the welder to weld?

A. Well, we run from 16 to 20 hours. It varied on some of them.

Q. That was after the crane was released?

A. Some of the ends of the sections were not true.

Q. And it was the boilermaker's job to true them up or fair them up? [99] A. That is right.

Q. And it would take in moving it in place and fairing it up so it was the proper distance for welding about 18 or 20 hours, is that what you say?

A. That is after we release the crane.

Q. Will you describe a turnbuckle, please? That is, will you describe the type of turnbuckles, the size and so on that were actually used, as you have said, by McDonald and Christianson in assembling the first few sections—the first couple of weeks in June?

A. Well, a turnbuckle is a one-inch rod. They have various sizes. That is what we used and there is an eye and a hook on one end. One is right-handed threaded and

(Testimony of Leon J. Tam)

one is a left-hand thread probably 10 or 12 inches long. It had a guide on there in which you put a pin and you turn it and that pulls them in.

Q. That pulls the two sections together?

A. That is right.

The Court: What is there on the sections to which you fasten the turnbuckles?

The Witness: We have a sort of a dog, sort of an oblong—the turnbuckle is threaded through here and threaded through here and you put the rod in and one is a left-hand thread—

The Court: That I understand. That is a turnbuckle.[100] But you have to fasten it on the two pieces of the tower sections.

The Witness: We put a plate on there, a one-inch plate.

Mr. Chance: Do you call that a dog or a clip?

The Witness: Call it a clip.

Q. By Mr. Chance: And you would put one end of the turnbuckle in the clip at the end of the section and the other end in the end of the new section that you were assembling? A. Yes, the hook in the other one.

Q. And you would by turning the turnbuckle bring the two together? A. Yes.

Q. Would you take the weight off of the new section by having the crane simply lift it up?

A. That is right.

Q. At the time you were working the turnbuckle?

A. That is right.

Q. Did you have more than one turnbuckle attached to the new and old sections in bringing them together?

A. Two, one on each side and pull them up uniformly.

(Testimony of Leon J. Tam)

Q. Would you have them up about the middle of the section? A. About the center, yes.

Q. That is, they would be about six feet off the [101] ground? A. Yes, sir.

Q. Plus the height of the crib?

A. I would say about seven foot on account of the cribbing.

Q. I would like to show you a tool and ask you to tell the court what it is. A. That is a turnbuckle.

Q. What is the dimension of that?

A. The overall length?

Q. What is the dimension? A. A one-inch rod.

Q. That is the swivel screw, is it? A. Yes.

Q. And that is one inch in diameter?

A. That is right.

Q. And is this substantially the size and type of turnbuckle that was in use by Christianson and McDonald on the bubble tower sections that they were assembling the first couple of weeks on that job?

A. Same size but one had only one eye and the other end had a hook.

Q. One end had an eye and the other end had a hook?

A. Yes. The other end had a hook. Instead of having an eye it had a hook. We would hook that in a hole in the [102] plate, this one, and put two lugs on and put a pin through.

Mr. Chance: Your Honor, I do not believe we need to offer this in evidence.

The Court: I do not think it is necessary.

Mr. Chance: I have here a drawing which I would like to have marked for identification as defendant's Exhibit 1. I show Mr. Tram this drawing and ask him if

(Testimony of Leon J. Tam)

this, roughly speaking, is a fair representation of three sections of a column bubble tower of the type that we are referring to in this testimony? A. That is right.

Q. And one of the sections at the right-hand end of the column has not yet been fully assembled?

A. Yes, that is right.

Q. And it has a crane at the end of the new section with a sling around the middle of the new section and has the weight slightly off the new section?

A. That is right.

Q. By the hoist of the crane?

A. The only difference here, the cribbing here was a different assembly. That is, it is wooden cribbing.

Q. This drawing shows the section was not lying identically the same as the section was that you had on the bubble tower?

A. That is right, yes. The crane was setting out to [103] one side. We had put the crane on the side to lift it but it works the same identical thing.

Mr. Chance: For purposes of illustration I would like to offer this.

The Court: Do you have any objection?

Mr. Sheridan: No objection.

The Court: It will be received in evidence for the purpose of illustrating the testimony.

The Clerk: Defendants' Exhibit A.

(The document referred to was marked as Defendants' Exhibit A, and was received in evidence.)

Q. By Mr. Chance: After the boilermaker did his work of bringing the two sections into juxtaposition and fairing up the ends of it, which took, as you say, between 18 and 20 hours, was there another crew that worked—

(Testimony of Leon J. Tam)

accomplished another function in completing the assembly of that section? A. No.

Q. What happened after the boilermaker had his work completed?

A. After he completed fairing up that section the welders would start welding it and probably he would have to get a buffer and get the other sections buffed off ready for assembling, which would be probably two and a half days.

Q. It took about two and a half days for the welders to complete the welding of that particular section? [104]

A. That is right.

Q. And that was true in each case of each section assembled? A. Put three welders on there.

Q. That was the normal number of welders?

A. That is right.

Q. And was that a finished welding job that they had to do? A. That is right.

Q. Was that called code welding?

A. Code welding, yes.

Q. That was not tacking or burning or anything?

A. No. Had to be a code welder to do the work.

Q. Now, would the crane be released from the section being assembled and would it be free for two and a half days before the next section was brought up?

A. That is right.

Q. Released to work on some other job?

A. Work on some other job until the welders were ready to make a turn and then they get the crane back and the crane turned it over.

(Testimony of Leon J. Tam)

Q. But when the crane finished a bubble tower it would go to another job and when that was finished it would go back to the bubble tower?

A. It would come back whenever we were ready for a [105] roll and they weren't busy.

Q. I see. To your knowledge and according to your observations can you say whether or not there were any turnbuckles actually at the site of the bubble tower during the first two weeks that McDonald was working on the bubble tower?

A. That is right, there was.

Q. You saw them there? A. Yes, sir.

Q. Now, to your knowledge, to your observation, can you state whether or not McDonald himself used the turnbuckles in assembling these prior sections during the first two weeks he was working on the bubble tower?

A. They used them on every section.

Q. Used them on every section?

A. That is right.

Mr. Sheridan: That is not an answer to the question. The question was, did McDonald use the turnbuckles?

Mr. Chance: Read the question.

(Question read.)

Q. By Mr Chance: Did McDonald use the turnbuckles on assembling these prior sections when he was working on the bubble tower the first two weeks? A. Yes.

Q. You observed that? [106] A. Yes, sir.

Q. You observed the turnbuckles? A. Yes, sir.

Q. There is no doubt in your mind about that?

A. Yes.

Q. That is, there is no doubt in your mind?

A. No doubt, no.

(Testimony of Leon J. Tam)

Q. Was it the common, usual and customary practice for boilermakers generally on Bahrein Island under your supervision and to your knowledge and observation, to use turnbuckles in the assembly of towers and vessels of the character of this bubble tower we are talking about?

A. Well, I started in the hard way and I have used them ever since I have been in the game and everybody else has.

Q. Now, I think that counsel could very well object to that answer. Will you read the question?

(Question read.)

A. That is right.

Q. It was the common practice?

A. That is right.

Q. Did the other boilermakers under your supervision use turnbuckles in the assembly of other vessels and towers on this job? A. That is right. [107]

Mr. Sheridan: Counsel, I will stipulate any boiler-maker under Mr. Tam will use turnbuckles.

Mr. Chance: Thank you for the stipulation, counsel.

Q. Will you state whether or not it is a fact that the sections of the bubble tower, of this particular bubble tower and other towers were assembled by boilermakers under your supervision after July 10, 1944, by use of turnbuckles, as well as other equipment?

A. That is right.

Q. Did you issue any instructions to Doyle McDonald on or about July 9, 1944, with respect to the assembly of a section in this bubble tower?

A. Yes. I told him to get everything ready for the next section.

(Testimony of Leon J. Tam)

Q. Will you state the time when you on that day, when you told him to get everything ready for the next section?

A. I told him in the morning, and I went back there about a quarter of two and told him we were going to work one hour overtime on account of wanting to use the crane some place else in the morning, to get that section together.

Q. Now, who was present in the morning, if anyone beside yourself and Mr. McDonald, when you told him to get everything ready for the assembly of the section?

A. All the crane operators were there and the coolies were there. [108]

Q. Anybody else that you remember?

A. I don't remember offhand, no.

Q. Now, you say that you went back the second time at about a quarter of two in the afternoon of July 9th?

A. That is right.

Q. And issued additional instructions to McDonald?

A. That is right.

Q. What did you tell him? First of all, who else was present besides yourself and McDonald at a quarter of two that afternoon?

A. Mr. Einer, the welding inspector.

Q. That was a quarter of two when he was there?

A. About a quarter of two, yes.

Q. What is his name?

A. Einer Arhendt, I believe it is.

Q. Can you spell that for us?

A. I don't know how to spell it.

Q. If I said it is E-i-n-e-r A-h-r-e-n-d-t, would that refresh your recollection?

A. That is about it.

(Testimony of Leon J. Tam)

Q. He was a welding inspector?

A. That is right.

Q. Who was he employed by?

A. A. L. Smith.

Q. By whom was he employed at the time, on this afternoon of July 9th? [109]

A. Why, he was a welding inspector for Bechtel-McCone and was sent over there by A. L. Smith.

Q. Was he working for the Bahrein Petroleum Company, Limited, do you know?

A. He was working for Bechtel-McCone on this particular tower. We had some A. L. Smith vessels there and we had some coming in and the ones that were on the island were completed.

Q. Was that A. L. Smith or A. O. Smith?

A. A. O. Smith.

Q. Was that company manufacturing vessels of this type?

A. Vessels and welding rods and so forth.

Q. And he was working for A. O. Smith Company?

A. That is right.

Q. Now, was anybody else present beside yourself and Mr. McDonald and Einer Ahrendt at a quarter of two on July 9th?

A. The riggers were there.

Q. That is, the crane riggers?

A. Crane operators and riggers.

Q. Do you mean the crane riggers?

A. Crane riggers, yes.

Q. Working under the crane operator?

A. That is right. [110]

Q. Was anybody else there?

A. Not that I know of, no.

(Testimony of Leon J. Tam)

Q. Were there any coolies there?

A. Coolies were there, yes.

Q. Were there any welders there?

A. Three welders.

Q. So I am correct in stating that yourself, McDonald, Einer Ahrendt, the crane operator, crane riggers, coolies—that is, McDonald's coolies?

A. Yes, sir.

Q. And the three welders?

A. Three welders.

Q. Were all present?

A. That is right.

Q. At the time you arrived at a quarter of two?

A. That is right.

Q. Now, what did you say at that time?

A. I told them they would have to stay over and assemble the section until three o'clock. That is, the riggers came an hour later and worked one hour later than we did.

Q. You told them to stay over?

A. That is right.

Q. In other words, his normal quitting time would be two o'clock? [111]

A. Two o'clock is when we quit.

Q. The end of an eight-hour shift?

A. Yes.

Q. Was at two o'clock?

A. That is right.

Q. And the crane crew worked a different shift, did they?

A. Yes. They worked a different shift than we did. They came an hour later.

Q. And worked an hour later.

A. That is right.

Q. So their normal closing hour was three o'clock in the afternoon?

A. That is right

(Testimony of Leon J. Tam)

Q. Why did you tell McDonald that you wanted him to work overtime that afternoon?

A. I told him we had to relieve the crane in the morning and we would get that section up close enough so we could release the crane and we could fair it up later.

Q. And did you say anything else to Mr. McDonald at a quarter of two that afternoon?

A. Not at a quarter of two, no.

Q. Then what did you do?

A. Then I had some other men working on another job, working overtime, so I went down there. [112]

Q. That was at a different location?

A. Different location, yes. I come back about 2:30 and the crane had just taken a lift on the tower. Probably it was within an inch or inch and a half of the shell and Mac was just standing there. The riggers were standing there and I said, "Well, what is the matter here? Let us get going here." I said, "We have to release this crane in the morning." I said, "Where are the turnbuckles?" He said, "I am no work horse."

Then he started blowing off.

Q. What else did he say?

A. He said, "To hell with you."

Q. What else did he say, if you can remember?

A. He said, "You ought to have a truck to get that stuff." I said, "You don't need a truck to get turnbuckles." I said, "They are right down there by the stack in a box."

So he says, "I am getting tired of taking your sass," or some such thing, "I am quitting."

So I was standing below the staging and I started to walk away and he came out there and gave me a shove

(Testimony of Leon J. Tam)

and put his dukes up and started cussing. I told him, I said, "Be careful, McDonald, and use your head." He did blow off, and I said, "Now, you are through working for me." I said, "You are through now," so he went off to the office, I guess. I don't know where he went. I didn't see him. So I grabbed [113] the coolies and went down and got the turnbuckles and came back and got the sections together before three o'clock.

Q. You put the turnbuckles on the two sections and brought them together?

A. That is right.

Q. Were there coolies present—now, let us go back here to get this complete. When you came back at 2:30 that was the third time that day on July 9th?

A. That is right.

Q. You came back to where McDonald was and that was about 2:30 in the afternoon?

A. About 2:30.

Q. And who was present? Let me put it this way. Were the same persons present at 2:30 when you came back?

A. That is right.

Q. And were present at a quarter of two that you told us about?

A. That is right.

Q. Were the coolies there?

A. The coolies and the welders and the riggers and inspector Einer.

Q. The crane operator?

A. Yes, the crane operator.

Q. And the crane riggers?

A. Crane riggers. [114]

Q. Welders? A. Welders.

Q. Coolies? A. That is right.

(Testimony of Leon J. Tam)

Q. How many coolies?

A. There must have been four or five of ours besides the welders' coolies.

Q. There were no other boilermakers there?

A. No, no other boilermakers. Didn't need only one.

Q. Were those coolies Mr. McDonald's coolies?

A. That is right.

Q. They were the regular coolie crew?

A. That is right.

Q. They had not quit at two o'clock when the normal hours were completed? A. No.

Q. They were working overtime?

A. They were working overtime, yes.

Q. Now, where was McDonald standing when you came on the scene at 2:30?

A. Standing on a platform. They had horses there, staging. He was standing on the staging probably a foot and a half off of the ground.

Q. Was that on the cribbing or separate from the cribbing? [115]

A. That is separate from the cribbing. We had 12-foot horses that we just moved along with the sections.

Q. And he was standing about a foot and a half off of the ground on that staging?

A. That is right.

Q. That is, he was only standing on a plank?

A. Yes, a 2 by 12.

Q. About a foot and a half off the ground?

A. That is right.

(Testimony of Leon J. Tam)

Q. When you came up to him how close did you come when you said, "What is the matter here? Let us get going."

A. I believe at that time I was right up to him.

Q. Within a foot or two?

A. Within a foot or two, yes .

Q. Now, when you had this conversation, this first part of the conversation with him when you asked him where were the turnbuckles and he told you he was no pack horse and you told him to go get them and he told you he was quitting—

A. That is right.

Q. Where did that part of the conversation take place? Did he remain on the scaffold or staging or did he come down on the ground?

A. He was up on the staging at that time.

Q. Now when in relation to his statement that he was quitting did he come down off of the staging and onto the [116] ground?

A. He came down off the staging when I started to walk away.

Q. That is after he said he was quitting?

A. He said he was going to quit; he wouldn't take orders from me, and I said, "That is up to you," so I started to walk away and he came down and gave me a shove and put his dukes up and I told him, "Use your head, Mac, be careful," and then he started to cussing and using abusive language, and I said, "Well, by gosh, you are through working for me now," so he turned around and left.

(Testimony of Leon J. Tam)

Q. At the time that he said he was quitting, that he was tired of your sass and he was quitting—

A. That is right.

Q. He was still on the staging at that time?

A. That is right.

Q. And did you turn and walk away before he got down off of the scaffolding?

A. Yes, I believe he did. I turned and walked away before he got down.

Q. Or staging? A. Yes, sir.

Q. How far had you gone from the staging before he came up and shoved you?

A. About ten or 15 feet. [117]

Q. You walked away 10 or 15 feet and he came up to you and gave you a shove? A. That is right.

Q. Then you both squared away?

A. That is right.

Q. Did either one of you—did either take a poke at the other? A. No, there was no pokes.

Q. How far were you when you squared away from each other? A. Oh, probably two foot.

Q. And it was then that you said, "You are through with me, you are not going to work for me any more," or words to that effect?

A. After he started getting tough I told him, "Now you are through working for me."

Q. Now, after he turned and went away in what direction did he go?

A. I never paid no attention to him. I went over and got the coolies and went after the turnbuckles when he left.

(Testimony of Leon J. Tam)

Q. Did you observe whether or not he went over and had a talk with Einer?

A. I don't believe he did. I am not sure.

Q. How far was Einer from where McDonald was standing on the scaffolding? [118]

A. Oh, probably 10 or 12 feet.

Q. Was he under a canopy or under a tent or anything?

A. No, he wasn't at the time, no.

Q. He was 10 or 12 feet away from McDonald who was standing on the staging at the first part of the conversation?

A. That is right.

Q. Did Einer remain in the same position during the time this altercation took place with McDonald?

A. I believe he did, yes.

Q. And did you have any further conversation of any kind or character with McDonald after this last that you have referred to?

A. I never seen him any more.

Q. Until, I take it, today?

A. Up until now.

Q. And what did you do immediately after McDonald walked away and after you had squared away with each other and then he turned away?

A. After McDonald walked away I went over and got the coolies and got the turnbuckles and came back and put them on and released the crane. We were through before three o'clock.

Q. How far did you go from the site of the bubble tower where you had the altercation with McDonald to get the turnbuckles? What distance was it?

A. About 200 yards. [119]

(Testimony of Leon J. Tam)

Q. What is that, about a good size city block or two?

A. About a block or a block and a half.

Q. A city block? A. Yes, sir.

Q. A good size city block?

A. About the size of a city block.

Q. All right. And when you went down to the smoke-stack to get these—let me ask you this. Where did you say you went to get these turnbuckles that afternoon?

A. I went down to the smokestack.

Q. And whereabouts at the smokestack were these turnbuckles?

A. It was about 200 yards north of the vessel—bubble tower.

Q. 200 yards north of the bubble tower?

A. That is right.

Q. Down at the smokestack? A. That is right.

Q. And were the turnbuckles lying on the ground or where were they?

A. They were in a big tool box.

Q. In a tool box? A. Yes.

Q. Is the tool box right near the smokestack?

A. That is right. [120]

Q. What is the size of the tool box?

A. About 3 by 7 and about 3 foot deep.

Q. Three foot deep, and how high?

A. Three foot.

Q. How long? A. About 7 foot.

Q. So it was three by three by seven feet?

A. That is right.

Q. And was there a top on it? You lifted the top?

A. There was a lid on it, yes.

(Testimony of Leon J. Tam)

Q. Did you lift it or did the coolies lift it?

A. The coolies lifted it.

Q. And did you order the coolies—did the coolies reach down inside and pick up the turnbuckles?

A. Picked up the turnbuckles and took them back to the column.

Q. Who did that? You or the coolies?

A. Coolies.

Q. The coolies reached down into the tool box and picked up the turnbuckles and carried them back?

A. Two turnbuckles.

Q. And did the coolies carry them back from the tool box to the bubble tower? A. That is right.

Q. You did not carry them yourself? [121]

A. No.

Q. Did you have a truck? A. No truck.

Q. Did you walk down there?

A. Yes, walked. I walked for 18 months around there. Didn't have no truck.

Q. What was the situation with reference to trucks being available to carry tools and equipment for boiler-makers?

A. The trucks on this project job was very scarce. In fact, we didn't have hardly any trucks on the job. The surveyors had probably a small pick-up they used to run around with. When they came around they would help us, but we carried most of the stuff.

Q. Did you have trucks available for parts of the time for carrying equipment?

A. If it was heavy equipment I would make arrangements to try to get one, but light stuff we didn't need one.

(Testimony of Leon J. Tam)

Q. Did the boilermakers generally have their coolies carry the tools and equipment around?

A. That is right.

Q. Was that what the coolies were for, to carry the stuff around?

A. That is right. That come under boilermakers' helpers. [122]

Q. How many trucks would you say were on the island in July of 1944 that were owned by or being used by this construction company in erecting this refinery?

A. I could not answer that because they were building a causeway out there.

Q. How many were available—I will withdraw that.

A. Well, I will tell you. In the boilermaker department we only had a pickup and a truck and that is for all tank work and all outside of the other trucks we had nothing to do with them.

Q. That was in the boilermaker department?

A. That is right.

Q. You had one pick-up and one truck?

A. That is right.

Q. What was the size of the truck?

A. Ton and a half.

Q. What was the size of the pick-up?

A. Just a regular pick-up.

Q. Ford pick-up? A. That is right.

Q. Those were the only two available?

A. That is all.

Q. I don't think you were in the courtroom when this testimony was given, but I will ask you whether or not during the first two weeks that McDonald was working on the [123] bubble tower under you, the first couple weeks of June—

A. That is right.

(Testimony of Leon J. Tam)

Q. Did he at any time demonstrate to you that turnbuckles could not be used satisfactorily in the assembly of the sections of this particular bubble tower?

A. No, sir.

Q. Was there anything like that? A. No, sir.

Q. That is, he at no time—

A. At no time did he demonstrate anything to me.

Q. Did he state to you in substance or effect that the turnbuckles could not be used in assembling these sections?

A. He must have been talking to somebody else. He wasn't talking to me.

Q. The answer is no then? A. That is no.

The Court: Had you had any difficulty or any argument or any discussion with reference to the procedure used?

The Witness: No.

The Court: In this construction work?

The Witness: No.

The Court: Your relationship with him had been friendly so far as you know?

The Witness: That is right.

The Court: That is all. I just wanted to clear that up. [124] Are you through with your direct examination?

Mr. Chance: May I review my notes for a moment?

The Court: You want to finish with this witness tonight?

Mr. Chance: I just want to be sure that I have covered everything. I would like to reserve the right to further examine the witness, but I believe I have completed.

The Court: You may cross examine.

Mr. Sheridan: It will take me a half hour to cross examine this witness. I do not want to impose on the

(Testimony of Leon J. Tam)

time of this court by starting in and taking an "attorney's half hour".

Mr. Chance: I wonder if we might request your indulgence? It is an awful request to make, I know, your Honor, because your Honor may have some other engagements, but this gentleman was kind enough to come down from the north and he has a business that he is about to enter upon for himself and he told me that he has to be in San Francisco tomorrow morning. He is going to drive all night tonight and he has to be in San Francisco tomorrow, and then he has to drive back down to San Luis Obispo tomorrow night. I told him that it was going to be a pretty crowded schedule.

The Court: I will continue until five o'clock, but not beyond that. If the examination of this witness is not completed by that time we will have to adjourn until tomorrow morning and this witness will have to remain over. [125]

Mr. Chance: Thank you very much, your Honor.

Cross-Examination

By Mr. Sheridan:

Q. Now, Mr. Tam, in your deposition at page 6, referring to Mr. Doyle McDonald, line 11, the question was asked:

"Did you know Mr. Doyle McDonald?"

"A. Yes, I knew him.

"Q. And did he work for you?"

"A. He worked for me about six or seven weeks.

"Q. He worked as a boilermaker under you, did he?"

"A. He worked as a boilermaker. He was no boiler-maker though.

(Testimony of Leon J. Tam)

“Q. What generally were his capabilities as you observed them based on your experience in boilermaking?

“A. I would say nothing but a damned crab according to my opinion, crabbing all the time.

“Q. How about his ability to perform the duties of a boilermaker? As a boilermaker should be able to perform them?

“A. He was no boilermaker at all. I don't think he ever worked at the boilermaker game until the war started, so far as boilermaking is concerned.” [126]

Now, that was your opinion at the time this deposition was taken? A. That is right.

Q. On September 15, 1945 in San Francisco, was it not? A. What is the date on that?

Q. September 15, 1945. A. Yes.

Q. And that is still your opinion of Mr. McDonald?

A. That is right.

Q. But despite that opinion of Mr. McDonald he was the only boilermaker who was joining the sections of this tower together on July 9th, isn't that true?

A. That is right.

Q. Did you have other boilermakers working under you at that time on July 9th?

A. I had about 25 of them working under me.

Q. Were they full-fledged boilermakers, capable boiler-makers?

A. Well, I would not say that now. You want to put me on the pan.

Q. Were those other 25 boilermakers what you would call boilermakers?

A. Some of them were good boilermakers, yes.

Mr. Chance: I object to that.

(Testimony of Leon J. Tam)

The Witness: But the average of them weren't boiler-[127] makers and I tell them that.

Q. By Mr. Sheridan: But McDonald was not a boilermaker?

A. No, he was not a boilermaker.

Q. Now, Mr. Tam, on page 7 of your deposition, line 1, the question was asked:

"Q. Did he refuse to follow your orders on any occasion?"

That is referring to Mr. McDonald. The answer was,

"A. Yes, he did."

Mr. Chance: What line is that?

Mr. Sheridan: Lines 1 and 2 on page 7.

Q. Now, Mr. Tam, would you tell us what Mr. McDonald did in the way of refusing to follow your orders?

A. Well, he was on this tower around July 27th, I think, and I asked him at that time to get everything ready and then when I went over there at a quarter of two I told him again we were going to assemble that section and I went back there at 2:30 and he had nothing ready. He didn't have the turnbuckles on the job.

Q. Isn't it a fact, Mr. Tam, when you came back at 2:30 on the afternoon of July 29th and not the 27th, isn't it a fact, Mr. Tam, that at the time you came back at 2:30 that the crane was not holding up the weight of the 20-ton section but that the cable was slack? [128]

A. The cable was slack?

Q. Isn't that a fact, that the cable line was slack around the cylinder section?

A. Well, I would not say whether it was or not.

Q. Answer the question yes or no.

Mr. Chance: He may explain it.

(Testimony of Leon J. Tam)

The Court: He says he cannot say. That probably means he does not remember.

The Witness: I don't remember whether it was slack or not at that time.

Q. By Mr. Sheridan: You testified on your direct examination that it was carrying the weight of the section. My question now is at the time you came back at 2:30 isn't it a fact that the line was slack?

A. I don't know. It could have been when I went after the turnbuckles. The riggers had raised it up and put it over there and were waiting for the turnbuckles.

Q. That is all I want.

Mr. Chance: In other words, it wasn't slack when you brought the turnbuckles back?

The Court: Wait a minute. Let Mr. Sheridan finish his cross examination.

Mr. Sheridan: Do not pursue that any further. He has already answered satisfactorily.

Q. Now, Mr. Tam, at page 9 of your deposition, line 8, [129] the question was asked:

"What equipment had you been using on these previous occasions?"

That is referring to the occasions when you were fixing other sections of the bubble tower.

A. That is right.

Q. The answer was:

"The same equipment we used on all of them.

"Q. What was that equipment?

"A. Turnbuckles, key plates and some lugs were welded on."

A. That is right.

(Testimony of Leon J. Tam)

Q. Isn't it or is it not true you used turnbuckles, key plates and lugs in putting all of these sections of the tower together? A. Yes, that is true, sure.

Q. Now, did you have any steam boat jacks which you used in joining these tower sections?

A. No. We did not have no steam boat jacks. We had hydraulic jacks.

Q. No steam boat jacks? None at all? A. No.

Q. Did you have any steam boat jacks on the island?

A. To my estimation there was none, I ever seen on the island. [130]

Mr. Chance: But you had hydraulic jacks?

The Witness: All hydraulic jacks.

The Court: I think it is better to let Mr. Sheridan proceed with his cross examination.

Mr. Chance: Pardon me, your Honor.

Q. By Mr. Sheridan: Now, Mr. Tam, did you tell Mr. McDonald prior to two o'clock to remain on the job and work one hour overtime? A. That is right.

Q. You personally told him that at a quarter of two?

A. I told him and told the welders and riggers myself personally.

Q. Did Mr. McDonald obey that order?

A. He did.

Q. Now, Mr. Tam, at page 11 of your deposition the question was asked at line 18: "When you came back around 2:30 did you see Mr. McDonald there?"

"A. He was standing there. He had not done a darn thing. I asked him why he hadn't gotten the turnbuckles."

Now, Mr. Tam, at the time you returned at 2:30 as you testified, isn't it a fact that key plates had been fastened to each side of the vessel and those key plates

(Testimony of Leon J. Tam)

had been wedged into shape so that the vessels were approximately one inch from meeting? [131]

A. You say key plates?

Q. Key plates had been tacked to the side and wedges inserted?

A. There was no key plates on the vessel at 2:30.

Q. Wasn't it a fact that when you arrived Mr. McDonald was standing on the scaffolding with a 12-pound maul in his hand, having finished striking the wedge and finishing getting the key plates in?

A. He might have had a 12-pound maul, but he never put no key plates on. That is a fact.

Q. Would he use a maul to apply a turnbuckle?

A. No, you wouldn't.

Q. What would you use the maul for?

A. Driving pins in the key plates and wedges and so forth.

Q. Now, Mr. Tam, you spoke of a tool box over near the smokestack approximately 200 yards from the bubble tower?

A. That is right.

Q. Isn't it a fact that the only tool box over there was one used by the pipe fitters to keep their wrenches in?

A. No, sir.

Q. It is your testimony that there was a tool box there for the use of the boilermakers?

A. That is right.

Q. What did they keep in those tool boxes? [132]

A. Hammers, wrenches, turnbuckles, jacks.

Q. What kind of jacks? A. Hydraulic jacks.

Q. How much weight would the hydraulic jacks carry? A. Eight, twelve, 20 tons.

Q. Did you have any 50-ton jacks?

A. We had them on the job, yes.

(Testimony of Leon J. Tam)

Q. How many?

A. Well, we didn't have any right on the particular work I had, but they were there. In fact, I think the riggers had two on the job. They belonged to the riggers.

Q. You are sure there were 12-ton jacks on the job?

A. That is right.

Q. Isn't it a fact the only hydraulic jacks made are 10, 15, 20, 25 and 50-ton? A. What?

Q. Isn't it a fact that hydraulic jacks are only made in 5, 10, 15, 25, 30 and so forth tons?

A. If I am not mistaken they had 12-ton jacks over there—hydraulic jacks.

Q. You are not sure, though, are you?

A. Damn sure.

The Court: You will have to be careful about your language.

The Witness: Pardon me. [133]

Q. By Mr. Sheridan: Now, Mr. Tam, isn't it a fact that on July 9, 1945, at two o'clock, the regular work day had ceased? A. That is right.

Q. When the regular work day ceased all those who were not ordered to work overtime ceased working on the job, did they not?

A. The boilermakers and riggers worked until three o'clock.

Q. Excuse me, but that is correct?

A. That is right.

Q. That is in the evidence before so we understand that, but the riggers came to work an hour later than your crew? A. That is right.

Q. And they worked an hour later?

A. That is right.

(Testimony of Leon J. Tam)

Q. But with reference to the boilermakers and the boilermaker helpers and the other regular help over whom you were foreman—

A. That is right.

Q. —when the two o'clock whistle blew their day was ended and they left the job, did they not?

A. They left if I had not asked them to work overtime?

Q. If you had not asked them to work overtime? [134]

A. That is right.

Q. Now, the coolies would leave just the same as the other regular help, would they not?

A. That is right.

Q. Now, isn't it a fact that on this day at two o'clock all the coolies left the job?

A. No, they didn't leave the job.

Q. Isn't it a fact none of them were working overtime on July 9th?

A. What?

Q. Isn't it a fact that none of the coolies worked overtime on July 9th on the bubble tower?

A. The coolies McDonald had were on the job when I went over there at 2:30. They went up and got the turnbuckles with me.

Q. Was Mr. Christianson with Mr. McDonald at that time?

A. No, sir.

Q. Now, Mr. Tam, was Mr. Christianson, the other boilermaker, working with Mr. McDonald at any time during the construction of this bubble tower?

A. At any time?

Q. At any time.

A. Yes, he was.

Q. Was he working with Mr. McDonald prior to the overtime period on July 9th? [135]

A. No, he was not even on the job on July 9th.

(Testimony of Leon J. Tam)

Q. Where was Mr. Christianson on that day, if you know?

A. On that day he was working up in the field on another tower.

Q. Was Mr. Christianson a boilermaker?

A. Yes, sir.

Q. I mean was he a good boilermaker—what you would call a good boilermaker?

A. I would say he was a good boilermaker, yes.

Q. Isn't it a fact, Mr. Tam, that Mr. Christianson arrived on Bahrein Island about two days after McDonald left?

A. After McDonald left?

Q. Yes.

A. If I remember right, he had been there six or eight months before McDonald arrived there.

Q. Isn't it a fact he arrived about the 14th day of July, 1944?

A. No.

Q. Mr. Tam, in your deposition at page 24, the question was asked at line 3:

"While McDonald was working at the smokestack was any work being done on the bubble tower?"

"A. No, there was none. [136]"

"Q. When you got a new section of the bubble tower in place how did you attach it to the assembled portion?"

"A. Well, we would have to put key plates on to draw it right up to these shims. Had to weld lugs on like one-inch nuts and then use drift pins and we put them about every two foot apart all the way around."

Then at page 25, line 12, the question was asked:

"Q. And the turnbuckles pulled the section over to the assembled section?"

"A. Well, got it up far enough to release the crane."

A. That is right.

(Testimony of Leon J. Tam)

Q. And continuing:

"Then we used key plates."

A. That is right.

Q. "Welded lugs on and we had the key plates and that pulled it right up.

"Q. That is the final cinch?

A. Yes; but the function of the turnbuckle was merely to preliminarily jockey these pieces of material into position so that the key plates could be put on and the final drawing together of these vessels could take place." [137]

Is that not true? A. That is right.

Q. Now, Mr. Tam, I am a little bit like the coolies. I am not strong enough to carry this big turnbuckle, but I show you this turnbuckle. It is substantially similar to the one we spoke about?

A. They are the same thing.

Q. And this is a jaw-to-eye turnbuckle?

A. Yes.

Q. Now, Mr. Tam, in putting the turnbuckle on the side of a 20-ton vessel on one side and we will say a 60-ton completed section on the other, what did you use to keep the turnbuckle out from the side of the vessel?

A. Welded one-inch lugs on the shell.

Q. Those lugs are called ears, are they not?

A. They call them ears. They have several names for them.

Q. Call them anything you want?

A. That is right.

Q. Now, were these ears tacked onto the side of the vessel? A. Welded on.

Q. Welded onto the side of the vessel?

A. That is right.

(Testimony of Leon J. Tam)

Q. How far out from the side of the vessel did the [138] ears or lugs extend?

A. Well, it would have to extend out far enough so you could turn the turnbuckle. If you put that one on you would put it out about two inches. You could turn that one.

Q. With this type—with the big one?

A. That would have to be out about three inches or probably four inches. I never measured it.

Q. Now, when that turnbuckle was out approximately four inches from the side of the vessel and it was welded onto the ears and your bolt was put through on the one side and the eye was hooked up on the other, then your turnbuckle was ready for tightening, was it not?

A. That is right.

Q. And what did you use to tighten the turnbuckle with? A. Fitting-up pipe.

Q. How long is a fitting-up pipe?

A. Around three foot long.

Q. Now, with a three foot long fitting-up pipe and your turnbuckle setting four inches out from the side of the vessel—

A. That is right.

Q. It would only be possible for you to take partial strokes, would it not? A. That is right.

Q. On your turnbuckle? [139]

A. That is right.

Q. How long would it take or how many partial strokes would it take with a three-foot pipe to tighten up a turnbuckle 24 inches?

A. According to how far the shells were apart.

(Testimony of Leon J. Tam)

Q. Say they were six inches apart and we were drawing them together?

A. Probably ten minutes.

Q. Do you think you could do it in ten minutes?

A. Yes.

Q. When you got your turnbuckle on this side of the vessel tightened up about one-third of the way—no, strike that.

When you started up with your turnbuckle on this side of the vessel did you twist it clear up and then go over to the other side and put on your turnbuckle and tighten it up?

A. Tighten both sides uniform. In fact we had the riggers helping us too.

Q. The riggers would help you?

A. They would take one side and we the other.

Q. You would tell them—didn't you have to tell them?

A. Didn't have to tell them. They knew they were as good as some of the boilermakers we had.

Q. Would you have some signal between you as to when to pull the drift bar so they would turn uniformly?
[140]

A. Didn't have to have as long as there was slack on the turnbuckle. If there was slack on the turnbuckle they would keep coming up.

Q. If one turnbuckle on one side was tightened up too much what would happen to the other turnbuckle?

A. We would tighten it.

Q. Oidin't you have to ask the fellow on the other side to back up until you could get your turnbuckle to working again?
A. No.

(Testimony of Leon J. Tam)

Q. If they started to cramp and bind what would you do?

A. If they were used right they don't cramp and bind.

Q. I am not talking about ideal conditions. These turnbuckles did cramp on you at times, didn't they?

A. I don't think so.

Q. Well, you had some Joe McGee's. Didn't they tighten and cramp on the Joe McGee's?

A. Yes. They put pipes on the gosh darn bars. That is why they done it.

Q. Stripped the threads on them?

A. Stripped some of them, yes. Sure you can strip them.

Mr. Sheridan: That is all.

Mr. Chance: Does your Honor know what a Joe McGee is? [141]

The Court: No.

Mr. Sheridan: There is only one more question, Mr. Tam. In the 35 years that you have been a boilermaker you have used turnbuckles considerably, have you not?

A. That is right.

Q. Could you tell the court what the working stress of a one-inch turnbuckle is?

The Court: We are going to take a short recess. At the rate we are going I do not know how you are going to finish with this witness.

Mr. Sheridan: I have one question and then I am through.

(Testimony of Leon J. Tam)

Q. Mr. Tam, will you tell the court what the working stress of a one-inch turnbuckle is?

A. I would say around 20 ton.

Q. The working stress where it is pulling against a weight?

A. What do you mean? Pulling strength—pulling stress?

Q. Yes, the pulling stress of a one-inch turnbuckle.

A. Just the one turnbuckle?

Q. Yes, one turnbuckle.

A. You want to know what a one-inch—

Mr. Chance: He has already answered that question. He said 20 tons. [142]

Mr. Sheridan: That is your answer, 20 tons?

The Witness: Yes, sir.

Mr. Sheridan: Against friction?

The Witness: Yes.

Mr. Sheridan: That is all.

Mr. Chance: No further questions.

The Court: This witness may be excused. We will adjourn now until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:45 o'clock p.m., a recess was had in the above-entitled matter until 10:00 o'clock a.m., Tuesday, October 2, 1945.) [143]

Los Angeles, California, Tuesday, October 2, 1945
10:00 A.M.

The Court: Are you ready to proceed, gentlemen?

Mr. Chance: We are ready, your Honor.

Mr. Sheridan: Yes, your Honor. If the court please, and with the indulgence of counsel, I would like to ask to put on one witness out of order for a short examination so he may go about his work.

The Court: Is there any objection?

Mr. Chance: No objection.

The Court: Very well.

Mr. Sheridan: Mr. Thompson, please?

HENRY THOMPSON,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Henry Thompson.

Direct Examination

By Mr. Sheridan:

Q. Mr. Thompson, what is your residence address?

A. 201 East 68th Way, Long Beach.

Q. Mr. Thompson, what is your business or occupation?
A. Boilermaker foreman. [144]

Q. How long have you been engaged in that occupation as a boilermaker or boilermaker foreman?

A. About ten or 11 years.

Q. Mr. Thompson, during the course of your employment during those 10 or 11 years, have you ever worked on a foreign construction project?
A. Yes, sir.

(Testimony of Henry Thompson)

Q. Were you foreman of boilermakers at Nome, Alaska? A. That is right.

Q. At the time you were at Nome, Alaska, Mr. Thompson, did you engage in the construction of vessels and tanks for oil field work? A. That is right.

Q. What was your capacity at Nome, Alaska?

A. I was foreman there in charge of erection of these tanks we were building there for the Government, for the Army Air Corps.

Q. Now, Mr. Thompson, in the construction of these tanks will you tell in your own words to the court what methods or techniques you customarily used for putting the sections of tanks together?

Mr. Chance: Object to the question on the ground that it does not show what type of tanks or vessels the witness is about to testify about, and does not show that he has any familiarity with the conditions existing on Bahrein Island. [145]

The Court: I will let him testify. The objection will be overruled.

The Witness: Shall I answer the question?

Mr. Sheridan: Mr. Reporter, will you read the question?

The Witness: I believe I remember it.

Q. By Mr. Sheridan: Very well.

A. In the construction of this work that we was doing there we was putting—we was fitting welded plate work together and we used a crane to raise the plate into position and caught it in place and fitted it up for welding with key plates and wedges and dogs—key plates and wedges primarily was the tool we used to bring the sheets close enough to weld properly.

(Testimony of Henry Thompson)

Q. Mr. Thompson, during this construction at Nome, Alaska, did you ever use turnbuckles as a tool for bringing the sheets or plates together?

Mr. Chance: Same objection as the objection to the previous question.

The Court: Same ruling. Answer the question.

A. No, no, we did not. We did not use turnbuckles on them. You could, of course, but it wouldn't be—would not expedite the job to use them. Key plates and wedges is the customary tool to bring your welded work close enough to weld up to a proper spacing.

Q. Now, Mr. Thompson, were you later on the Canol [146] project? A. That is right.

Q. What was your capacity on the Canol project at White Horse? A. I was erection foreman.

Q. During the process of your work as erection foreman on the Canol project were you constructing towers or vessels for the refining of oil or the storage of oil?

A. Why, why, yes—not towers but vessels and tanks.

Q. Now, Mr. Thompson, in the construction of these towers or tanks what equipment would you use to bind the sections together or get them prepared for welding?

Mr. Chance: Same objection as the objection made to the second to the last preceding question.

The Court: Same ruling.

The Witness: We used key plates and wedges.

Q. By Mr. Sheridan: Did you use turnbuckles on the sections at all?

A. No, no. You would not use turnbuckles on them for the same reason that they would not be suitable for that type of work in my opinion.

(Testimony of Henry Thompson)

Q. Mr. Thompson, in your practice and in your work would you find using turnbuckles would be impracticable because they would bind? A. Yes, sir. [147]

Mr. Chance: Object to that question.

The Court: The question is leading but I think I shall let him answer.

The Witness: There are various reasons why I wouldn't use turnbuckles. If your work is hanging—your object is that you are trying to fit up plates that are hanging in a position that is not exactly—they do not exactly correspond to the base work that you are fitting to. Your turnbuckles would have to be adjusted rather delicately to draw them into place, and if they were not they would pull your work out of line rather than bring it into line, in my estimation, exactly where it should come. In trying to substitute or in substituting turnbuckles for key plates in any kind of plate work, fitting up any kind of plate work, my experience has been you do not gain anything by it. You lose time and just don't do as good work. You can't get the work up in as good shape and it takes longer.

Mr. Sheridan: That is all.

Cross-Examination

By Mr. Chance:

Q. You say you worked on tanks on the Nome, Alaska job? A. That is right.

Q. What type of tanks were they? Storage tanks? [148] A. That is right.

Q. What was the approximate diameter and height of those storage tanks?

A. The tanks that we had—they were 25—let me see, about 25 feet in height and approximately 100 feet in diameter. I believe that is right—that is approximate.

(Testimony of Henry Thompson)

Q. Five thousand barrel or ten thousand barrel capacity? A. No, about 25 thousand barrel storage.

Q. 25 thousand barrels? A. Yes.

Q. About 25 feet high and 100 feet in diameter?

A. Approximately. That is as near as I would remember. It would run about 25 thousand barrels.

Q. And when you assembled the sections of these storage tanks at Nome, Alaska, were the sections fabricated in one tubular section completely joined together as a section? A. Oh, no.

Q. You had a number of plates to make each section, did you? A. That is right.

Q. And you assembled or welded them together on the ground, is that correct?

A. You mean on the ground? You mean on this job site?

Q. Let me withdraw that. I mean to say you would have [149] plates that you welded together with other plates to make up the sides of the storage tank?

A. That is right.

Q. And what was the size of these plates, approximately?

A. They were approximately six by 28, I believe, by varying thicknesses from 5-8ths to 3-8ths.

Q. That is 6 feet by 28 feet by 5-8ths—that is, 6 feet long and 28 feet wide and 5-8ths in thickness?

A. Yes. Only I would say 6 feet wide and 28 feet long. You just reversed that.

Q. And you would take those plates 6 by 28, 5-8ths material, and you would join each plate to a preceding

(Testimony of Henry Thompson)

plate about the same size to make up the side of the storage tank, isn't that correct?

A. That is right; in a ring—in what we would call a ring, the first ring and so on as you went up.

Q. Now, what was the weight, approximately, of those plates 6 by 28 by 5-8ths would you say?

A. Well, let me see. You mean you want me to tell you just what it is?

Q. No, just give me your best judgment of what a plate 6 by 28 would weigh.

A. About 1,800 or 2,000 pounds.

Q. Around 1 ton approximately? [150]

A. Yes, just roughly. I could tell you closer than that but I don't remember.

Q. That is close enough. Now, how many of these plates 6 feet in height and 28 feet long—the storage tank when assembled was about 25 feet high and if that is so you would have four sections joined one to the other after you got them together?

A. That is right. I don't remember exactly. I have built a good many tanks and I don't remember exactly whether it was a five-ring tank or a six ring tank, or whether it came out even 23 feet or 26 feet. I don't know exactly.

Q. I don't want to pin you down. I want to get the approximate height of these things to compare them with what we have involved in this case. Now, did you do approximately the same type of storage tank assembly on the Canol project at White Horse, Canada?

A. Yes, approximately.

Q. You were assembling storage tanks only at White Horse on the Canol job?

A. Yes, that is right.

(Testimony of Henry Thompson)

Q. You did not work on either of those two projects, either the Nome, Alaska project or Canol project on these 150-foot bubble towers that would go into an oil refinery?

A. No; they didn't have any at Nome, and I didn't actually work on any of them. [151]

Q. You did not actually work on any of the bubble towers on the Canol project either, did you?

A. That is right.

Q. Would you say in your opinion it would be improper boilermaker practice in joining 20-ton sections, approximately 12 feet in diameter together with like sections that go to make up a 150-foot bubble tower of a catalytic cracking unit to use turnbuckles together with wedges, jacks and cranes in assembling those sections?

A. Well, in my experience—of course I can only give you my opinion of it. I would say it would be improper inasmuch as I think that the turnbuckles would not be the proper tool. You can use them, certainly, but in my experience in fitting up heavy plates, inch and inch and a quarter or inch and one-eighth plates in high pressure vessels, why, I have very seldom if ever seen them use turnbuckles to do it with.

Q. Have you seen them use turnbuckles together with key plates and wedges, jacks of various types, steam boat jacks or hydraulic jacks of various pressures or come-alongs together with a crane in the assembly of approximately 20-ton sections in a bubble tower assembly?

A. Well now, I will tell you in the States here and in most of the work, refinery work, those bubble towers are not assembled in a refinery. They are assembled in the shop and [152] that is a shop man's job.

(Testimony of Henry Thompson)

Q. Have you ever seen a bubble tower section assembled at the site of a project in the field?

A. On the Canol project only.

Q. You saw them doing it there although you did not work on it? A. Yes; I was there.

Q. You did not work on the assembly of the bubble tower sections?

A. No, actually I did not have any authority over the assembly of it. I had men working on it that were under me but I loaned them to that department.

Q. But you did not work on it yourself?

A. No.

Q. On the bubble tower? A. No.

Mr. Chance: No further questions.

Redirect Examination

By Mr. Sheridan:

Q. Mr. Thompson, you state that when you saw them assembling the bubble tower sections at the Canol project that— A. Yes.

Q. Would you state to the court what method they used [153] in assembling the bubble tower sections at Canol?

A. Well, that is a pretty technical question.

Mr. Chance: The witness first testified—I will withdraw that.

The Witness: When they first started assembling them they were using various methods. As I say, it is a shop job where they have the proper tools to do it in the shop and nearly everyone that was connected around there was giving a little advice on the subject. Finally I believe they wound up with key plates and wedges.

(Testimony of Henry Thompson)

Mr. Chance: Would you say they did not use turn-buckles—I am sorry, pardon me.

The Witness: Shall I answer the question?

Mr. Sheridan: That is all. Answer the question.

The Witness: No, I would not say that they did not use them but I believe they did cease using them before the job was finished.

Recross-Examination

By Mr. Chance:

Q. But they may have used them so far as you know on the Canol job? A. Part of the time, yes.

Q. You say it is a shop job to assemble nine or ten ton sections of a 150-foot bubble tower? [154]

A. Oh, yes.

Q. In the States?

A. If you just notice when you are driving around Los Angeles where a new refinery is being constructed you will see them haul in the bubble towers—100 or 90-ton vessels. Sometimes they might bring them in in halves but generally, I believe, and hardly without exception they are brought in complete.

Q. But on a foreign job where they have to ship the sections from this country to the Persian Gulf, for example, they do not assemble those altogether in the shop, do they? A. I think not, no.

Q. Were you ever on Bahrein Island? A. No.

Q. Were you ever in Arabia? A. No.

Mr. Chance: No further questions.

(Testimony of Henry Thompson)

Redirect Examination

By Mr. Sheridan:

Q. Mr. Thompson, I would like to ask you one question with the indulgence of counsel?

Mr. Chance: Certainly.

Q. By Mr. Sheridan: Mr. Thompson, do you know Mr. Doyle McDonald, the plaintiff in this case? [155]

A. That is right.

Q. Has Mr. McDonald ever worked for you?

A. Yes; he worked for me on the Canol project in Canada. He did various jobs but he wound up with a job as foreman of the construction of the structural work. He had charge of building the structural work for the tanks of a certain size.

Q. Were you the man immediately in charge of Mr. McDonald on the Canol project?

A. Yes; his operation was under me and he had to satisfy me to get along.

Q. Well, did you observe the workmanship of Mr. McDonald during the period he was on the project?

A. That is right.

Q. What kind of work did Mr. McDonald do?

Mr. Chance: Object to that as being incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: He may answer.

The Witness: How was that now? You asked me what kind of work he did.

Q. By Mr. Sheridan: What was the degree of his workmanship? Was it good or bad or fair?

A. He was successful and did a very nice job on the work he did for me. [156]

(Testimony of Henry Thompson)

Q. You were satisfied with the work he did?

A. That is right.

Mr. Sheridan: That is all.

Recross-Examination

By Mr. Chance:

Q. Mr. Thompson, you know, do you not, that Mr. McDonald's last classification on the Callahan job at Canol, in the month of October, 1943, was the classification of a welder at \$1.75 an hour, do you not?

A. That is right.

Q. And you also know, do you not, that Mr. McDonald quit the employment on his nine months contract at Canol before the expiration of the nine months because he wished to return to the States and voluntarily resigned, do you know that?

A. That is right.

Mr. Chance: No further questions.

The Witness: Would you let me qualify—make a statement on that question?

Redirect Examination

By Mr. Sheridan:

Q. Mr. Thompson, I will qualify it. Was it or was it not true that you had a verbal contract with Bechtel-Price [157] and Callahan that when the welding job was finished that the welders would be able to leave the project?

Mr. Chance: If you know.

The Witness: Sir?

Mr. Chance: Do you know of any such agreement.

The Witness: There was some such an idea, yes—I don't know.

(Testimony of Henry Thompson)

Mr. Chance: I move to strike the witness' answer on the ground he has shown he does not know.

The Witness: There was one.

The Court: I do not think this is so highly material. The fact is, he quit because his work was unsatisfactory would be the only question that would be very material here.

The Witness: The one thing here that I wanted to state to the attorney was that when I said he was acting as foreman, he was acting as a junior boilermaker foreman which drew a rate the same as the welder, the high pressure welder on the job. That is the reason the \$1.75 was paid him. That was a combination rate in that case.

Recross-Examination

Q. By Mr. Chance: But the classification was that of a welder?

A. A junior boilermaker foreman on the job drew \$1.75.

Q. Was he actually welding?

A. When he was drawing this job, no. He was acting [158] as foreman or junior foreman or pusher we generally say, of this construction.

Q. Do you know that he was up on that job from about June 2nd, 1943 to the date of his departure on October 7, 1943, which was about two and a half months?

A. You say do I know that?

Q. Does that coincide with your knowledge of how long he was on the job? About two and a half months?

A. I don't remember. I thought it was, perhaps, longer than that, but I did not remember. There was a good many men coming and going and I would not say other than that.

(Testimony of Henry Thompson)

The Court: That would be about three and a half months, wouldn't it?

Mr. Chance: June 2nd to October 7th. Yes, that is right.

The Witness: That sounds more like it. I was thinking about three or four or five months or something like that.

Q. By Mr. Chance: Part of the time he was working as a welder on that job? A. Yes.

Mr. Chance: Nothing further.

Mr. Sheridan: May this witness be excused, your Honor?

The Court: Yes. Who is your next witness?

Mr. Chance: I would like to have Mr. McDonald back on [159] the stand for further cross examination.

The Court: Mr. McDonald, will you resume the stand?

DOYLE McDONALD,

called as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Chance:

Q. After you left Mr. Tam on the afternoon of July 9th, after you had this altercation with him, to which you referred in your previous testimony, you say you went over to wait for a ride in front of the field office. You went over there to get a ride to the camp at Awali?

A. That is right.

(Testimony of Doyle McDonald)

Q. And you say that while you were waiting out in front of the construction office, waiting for the ride to go to Awali, that Harold Vessels came out of the office or was out in front of the office and struck up a conversation with you?

A. Whether he came out or was out in front of the office I don't know, but we did strike up a conversation.

Q. And you say that Mr. McAuliffe then came out of the construction office a little while later, while you were [160] still waiting there with Vessels?

A. I believe Mr. McAuliffe was going in. I am not sure.

Q. The conversation with Mr. Vessels was interrupted then by Mr. McAuliffe coming up to where you two were standing, is that about it?

A. As I recall Mr. Vessels interrupted Mr. McAuliffe and stopped him.

Q. And then Mr. McAuliffe asked in effect, what was the trouble, and you told him that you had had an altercation or a dispute with Mr. Tam?

A. No. Mr. Vessels explained that there had been some trouble.

Q. He told McAuliffe there had been some trouble?

A. And he wanted me to explain it to Mr. McAuliffe.

Q. So you then told Mr. McAuliffe that you had had some trouble with Tam that afternoon on the job?

A. I explained the situation.

Q. Now, in your deposition given in May of this year in this case, at page 27, line 7, and following lines, you said that:

"It was approximately half an hour after I had to leave the job. All our rides were gone. I went over to the office

(Testimony of Doyle McDonald)

and waited for my ride, which is the usual place to wait. Mr. McAuliffe came by [161] at the time, and I told Mr. McAuliffe, I said, 'I have been fired over there,' and explained to him. I said, 'Seems as though I can't work for Tam. Have you got any other job? I'd just as soon work on another job.' 'Well,' he said, 'we are going to stop this transferring, put a stop to it.' And he said, 'We will see.' He said, 'You come back out in the morning and report to'—he was the consulting engineer. Walt knows his name. I can't recall it."

And then skipping a line:

"Harold Vessels was his name. That is the fellow I am speaking about."

Now, skipping over to page 28, line 2, you continued:

"He asked me to come back the next morning. Mr. McAuliffe said, 'You come back and see Mr. Vessels, and he will take care of it.' He asked me to come back the next morning."

Now, is that your testimony on May 19th of this year in this case?

Mr. Sheridan: Just a moment, counsel. I would like to have you complete that line.

Mr. Chance: I will come back to that. I will do so. There is the further sentence:

"I was waiting the next morning, waiting [162] to go ahead."

Is that your testimony as I have read it that you gave in your deposition on May 19th of this year?

A. If you have read it correctly that is my testimony.

Q. That is your testimony?

A. Evidently, if you read it correctly.

Q. That is your testimony? A. Yes, I suppose.

(Testimony of Doyle McDonald)

Q. So that your present recollection of the sequence of the persons with whom you talked differs now from what it was on May 19th of this year, is that correct?

A. No. I still stand by my testimony in the deposition.

Q. You do?

A. Yes. And the testimony I gave on the stand just now.

Q. You stand by both of them?

A. That is right. They both coincide.

Q. Now the next morning you say that you came back to the construction office from Awali—you came from Awali to the construction office at the refinery site the first thing in the morning, is that correct?

A. I returned from Awali to the field construction office waiting my future directions.

Q. And you did that the first thing in the morning of [163] July 10th, 1944?

A. It was the day I was requested to come back. To be sure on the 10th I don't know, but it was the day after the altercation.

Q. In other words, if the altercation was on the afternoon of July 9th, you came back the first thing on the morning of July 10th?

A. If the 10th was the day I returned, yes, so far as I know.

Q. If the 9th was the day of the altercation, then you would say that you came back on the morning of the 10th, is that correct?

A. That is right in that sense of the word.

Q. Now, who was the first person you met when you came back the following morning on July 10th we will assume is the date, who was the first person that you

(Testimony of Doyle McDonald)

saw and had a talk with in front of the construction field office—Ed Gratz, or did you first talk with Harold Vessels?

A. To be positive I couldn't say which one was first, to be truthful. It has been so long, but I believe I did talk to both of them.

Q. You did talk to both Gratz and Vessels that morning?

A. Yes, but not together.

Q. They were separate conversations?

A. That is right. [164]

Q. That is, when you talked to Gratz Vessels was not present?

A. Yes.

Q. And when you talked to Vessels Gratz was not present?

A. Something on that order.

Q. You don't recall whether you talked to Gratz first when you first got there or whether you talked to Vessels when you first got there, to the construction camp on the morning of July 10th?

A. Roughly speaking out of a clear sky, as a rough guess, I believe it was Harold Vessels I talked to first. I am not positive now.

Q. Your best recollection now is that you talked to Harold Vessels first?

A. As I can remember—I am not positive either way. As I explained—

Q. Your best recollection is that it was Vessels first?

A. I do remember talking to both of them.

Q. Your best recollection this morning is that you talked to Vessels first?

A. Roughly speaking. I am not positive.

Q. All right. Now, in your deposition given in this case on May 19th of this year, at page 28, line 11 and

(Testimony of Doyle McDonald)

following lines, you gave the following testimony, did you not? [165]

"I came back the next morning, and I was standing there and up came the superintendent of boilermakers.

"Q. What was his name?

"A. I only met him that one time. Gratz.

"Q. You refer to Ed Gratz?

"A. That is right. He said, 'I understand you had some trouble over there with Tam.' I said, 'There is nothing particularly wrong about that.' I said, 'A lot of fellows have had trouble with him.' 'Well,' he said, 'did you know I was superintendent here?' I said whether I knew it or not was immaterial to me at the present time. I said I was fired and going home. He said, 'Why did you go to the office, instead of me?' I said, 'I didn't particularly go to the office.' I said, 'I came over here to wait for a ride.' I said, 'Mr. McAuliffe and Mr. Vessels collared me, and they had heard I was going to work overtime and wondered why I wasn't there, and,' I said, 'I told them.' He said, 'You are supposed to report this stuff to me first.' I said, 'Well, forget about it.' I said, 'I am not here to argue. I am waiting for somebody else.' He said, 'Well, you are fired. You are through. You are finished.' He said, 'That is for sure.' He said, 'I am running [166] the business, and I am going to continue to run it.'"

Now, was that your testimony on May 19th of this year as best you recall?

A. I believe that is right as far as I can recall. On the position of the word "collared," that is a rough term used on construction consistently, even talking to a friend. You don't refer to it as a slam or slander against any particular person.

(Testimony of Doyle McDonald)

Mr. Chance: I move to strike the last two sentences of the witness' testimony as not responsive to the question.

The Court: The motion will be denied. I don't think it is material anyway. I am interested in one particular point. You say that Gratz said to you:

"Well, you are fired because you didn't come to me." or that in substance, and you said,

"It makes no difference to me, I am going to quit anyway."

Is that what you said?

The Witness: I believe I said I was going home, sir. I am not positive. The situation involved when you are fired, it is understood after all you are in a foreign country and you are strictly under the control, sir, of these companies. They are the law.

The Court: You do not need to go into those details. [167]

The Witness: But it meant you were going home.

The Court: Why did you report to the office the next morning?

The Witness: Mr. Vessels had asked me to come back.

The Court: Did you report there to go to work or to tell them you were going to quit?

The Witness: I reported down there, sir, to have Mr. Vessels tell me what my next step would be. He asked me to come back.

The Court: What was your intention?

The Witness: To go to work, sir. It was my intention to carry on with my contract. I wanted to do that very much.

(Testimony of Doyle McDonald)

The Court: That is all unless that suggests some questions, Mr. Chance.

Q. By Mr. Chance: Now in your deposition given in this case on May 19th of this year at page 29, commencing at line 12, you testified as follows, did you not?

"So Vessels came out and said, 'Mac, go on out there and go to work.' I said, 'Ed Gratz just fired me.' I said, 'On top of Tam, Gratz made it unanimous.' I said, 'I am fired, and I am going back to camp.' So I got a ride back to camp in the hospital car."

That was your testimony on May 19th, was it not?
[168]

A. That was part of it.

Q. What I read just now from your deposition you testified to exactly on May 19th, did you not?

A. Yes, that portion of it.

Q. Now, when you went back to camp that morning of July 10th after Vessels had said, 'Mac, go out there and go to work,' and instead you went back to the camp at Awali, you have testified that Earl Paine, the office manager of the company, came to see you in your room at Awali?

A. That is right.

Q. What time of the day did Earl Paine come down to see you on that morning of July 10th?

A. It was the morning part of the day. To be right frank with you it could have been anywhere from 10 to 12 o'clock so far as I know.

Q. Sometime in the forenoon?

A. Yes, I believe so.

(Testimony of Doyle McDonald)

Q. Did it take you about an hour to get back to camp in the hospital car after you had had your talk with Vessels?

A. No. It only takes about 15 or 20 minutes at the most.

Q. Now in your deposition on May 19th of this year at page 29, beginning at line 15, you testified as follows, did you not?

"So I got a ride back to camp in the hospital [169] car. At the time they had changed employment managers, and Mr. Paine came down. I had been sick off and on for some time, and I had gone to bed. He woke me up, and he said, 'Will you sign these papers? You have been fired.' I said, 'I am sleeping right now. When do I get out of here?' He said, 'A couple of days.' I said, 'Put it off, I will come to the office and sign them, and I will go on to sleep. I would rather not be bothered now.' So he stood there and talked to me a while. 'Well,' he said, 'How do you want to sign, you are fired or discharged?' I said, 'It is very definite. You can't make anything else out of it but one thing. It is practically immaterial to me how I sign.'

"Q. Fired or discharged?

"A. Yes, or quit.

"Q. Or resigned, did he use that expression?

"A. No, he said quit, I believe. I said, 'You can only make one thing out of it.' He said, 'I will fix it up.' So I didn't sign anything particularly that I recall, whether it was fired or discharged or quit."

That was your testimony on May 19th in your deposition, was it not? [170]

A. I believe so, yes.

(Testimony of Doyle McDonald)

Q. You first joined the boilermakers' union for the first time, A. F. of L. Local 92 in September, 1941, in the classification of a burner, did you not?

Mr. Sheridan: Now, your honor, this type of thing is immaterial.

Mr. Chance: I submit, your Honor, if it was material to have Mr. Thompson testify to his version of the experience and qualifications of this witness that it is proper for me to show the background, the actual background from the record of this witness.

The Court: I think we are using more time than is necessary insofar as it may involve the major issues of this case—that is, as to whether he was discharged or voluntarily quit and as to whether there was cause for discharge. But he may state briefly his experience as a boilermaker and when he became identified with the union, but there is no use to spend a great deal of time on that.

Mr. Chance: I shall not spend a great deal of time. I will make an offer of proof if your Honor would prefer me to shorten it.

The Witness: I will shorten it.

The Court: You go ahead and tell us when you joined the union and what your experience as a boilermaker has been.

The Witness: In 1928 I joined Machinists' Local in [171] Washington, D. C., and was a specialist riveter for the Boeing Aircraft method of osmosis metal—

Mr. Chance: Just a moment. I would like to offer—

The Witness: I will tell you in just two minutes.

Mr. Chance: I would like to ask the questions, if I may.

The Court: Well, the court asked this question. I told him to go ahead and state his qualifications.

(Testimony of Doyle McDonald)

The Witness: Approximately two years later I went to the Friant Dam and was a member of the Machinists' Local there as a welder. I was a welding foreman a big portion of the time, approximately two years, sir.

The Court: That was when?

The Witness: From. I believe approximately the year of '39 and '40. At that time the war broke out and I came to the harbor to get in war work. I worked two years for Calship and my old foreman was down there and he suggested that I take up burning because I was so excellent at it and they needed good burners.

Mr. Chance: I move to strike that.

The Witness: That was my boilermaker's experience as a burner, sir.

The Court: Go ahead.

The Witness: Then I went to Corpus Christi on the Canol project as a burner. They asked for five of us fellows [172] and we went there. At that time I met Mr. Thompson. I came back to Calship and worked as a burner leadman all that time at Calship prior and after then. I left for the Canol project. I went up there as a blacksmith, which work I did as a structural foreman, layer-out, as a burner, as a welder.

I came back and I went to work at the United Concrete and Pipe for a short period of time and then I went to Bahrein Island in the Persian Gulf as a boilermaker. I came back and have been a rigger leadman at United Concrete and Pipe ever since, sir, and still am.

Q. By Mr. Chance: Now, the first time that you were in the classification of a boilermaker was for the three months, part of the three months that you were on

(Testimony of Doyle McDonald)

the Canol project, from June to October of 1943, isn't that correct?

A. There was no union up there involved.

The Court: Was that the first work you did as a boilermaker?

The Witness: As a boilermaker at Calship from June, 1941, I believe, until 1943 or June, 1942. I was there two years, from June to June.

Q. By Mr. Chance: You were a boilermaker at Calship? A. Boilermaker-burner.

Q. I will show you an application which you signed and a photostatic copy of an application for employment at [173] Bechtel-Price-Callahan, dated June 14, 1943, and ask you if that is your signature on that?

A. That is my signature.

Q. And on that—

Mr. Sheridan: Counsel, I would like to see that.

Mr. Chance: Yes.

Q. You show in this application that you were in the mining business for yourself from 1933 to 1938. Is that correct? A. Yes, to a certain extent.

Q. That is your own handwriting on there, is it not?

A. That is right.

Q. You show that from 1938 to June, 1938, you were with Boeing Aircraft as a welder at 85 cents an hour, is that correct? A. That is right.

Q. That is also in your own handwriting?

A. That is right.

Q. And you show that from June, 1939, to June, 1941, you were employed as a welder welding combination for Griffith Company. That was on the Friant Dam job you referred to? A. That is right.

(Testimony of Doyle McDonald)

Q. And you show that from June 1941 to June 1943 you were with Calship Building Corporation on Terminal Island [174] burning leadman, is that correct?

A. That is right.

Q. So the first time you actually worked in the classification of a boilermaker was on the Canol job between June and October of 1943, isn't that correct?

A. That is wrong. At Calship was my original work.

Q. I am asking you as a boilermaker and not as a burner.

A. No, that is wrong, you are wrong.

The Court: What is the difference between a burner and a boilermaker?

The Witness: Shall I explain that, sir?

The Court: Yes.

The Witness: The difference between a boilermaker—a boilermaker's local, which is more or less immaterial to me—

The Court: I don't care whether it is immaterial to you or not. Tell the court what the difference is.

The Witness: They have burners, they have welders, they have fitters, they have layout men. They have various specialist men out of their local and they are all termed boilermakers.

The Court: Do you belong to the boilermaker's union?

The Witness: Yes, and are termed as such and the same thing occurs.

The Court: What kind of work does a burner do? [175]

The Witness: Burning of flat plates, not round but flat plates with longitudinal lines of various thicknesses and various angles and various bevels.

(Testimony of Doyle McDonald)

The Court: That is sufficient. I just wanted to see whether there was any relationship at all between the two.

Mr. Chance: No further questions.

Redirect Examination

By Mr. Sheridan:

Q. Mr. McDonald, with regard to your conversation with Mr. Vessels which you reiterated in your deposition on page 29, line 12, you stated:

"So Vessels came out and said, 'Mac go on out there and go to work.' I said, 'Ed Gratz just fired me.' I said, 'On top of Tam, Gratz made it unanimous.' I said, 'I am fired and I am going to camp.'"

Is that your entire conversation that you had with Vessels at that time and place?

A. That is only a part of the conversation, I believe. As you go on and read somewhere in there—I believe I can tell you before you read it, that he said, "Well, that makes the difference," or something to that order. "It must be out of my hands." I believe that is part of the conversation.

Mr. Chance: If that is in the deposition I ask counsel [176] to point it out to the court.

Q. By Mr. Sheridan: It is your testimony at this time that further conversation took place, is it not, Mr. McDonald?

Mr. Chance: Just a moment. I object to that as not being proper redirect examination. It is leading and suggestive. I ask counsel if he can show in the deposition where that statement appears.

The Court: Is it your contention that he so testified in the deposition?

(Testimony of Doyle McDonald)

Mr. Sheridan: That is not my contention.

The Court: Was there any further conversation than that which has been read to you?

The Witness: Other than which I have explained? Mr. Vessels at the time explained to me, he said, "That makes it altogether different; it takes it out of my hands," in which he was more or less—

The Court: Well, we don't want your comment.

Q. By Mr. Sheridan: Just state what Mr. Vessels said when you told him that Gratz had fired you?

A. I believe that he said, "That makes it much different; it takes it out of my hands. I cannot do anything further about it," but he would try.

Q. By Mr. Sheridan: Well, to your knowledge was there any further attempt made to assign you to another job on [177] Bahrein Island?

A. There was no further attempts made that I know of.

Mr. Sheridan: That is all.

The Court: Anything further, Mr. Chance?

Mr. Chance: Nothing further at this time, your Honor.

Mr. Sheridan: Your Honor, we have a statement of account which was prepared by the Bechtel-McCone Corporation in its office in San Francisco which shows the status of accounts between Mr. McDonald and the Bechtel-McCone Company—that is, the Bechtel-McCone Constructora Corporation of South America, and counsel at this time wish to stipulate that this account is a correct account of Mr. McDonald and the South American Company, and we wish to introduce it in evidence as such.

Mr. Chance: I so stipulate.

(Testimony of Doyle McDonald)

The Court: On that stipulation it will be admitted in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 3, and was received in evidence.)

[PLAINTIFF'S EXHIBIT NO. 3]

DOYLE McDONALD
STATEMENT OF ACCOUNT

Employed April 20th 1944.

Terminated July 10th 1944.

Bahrein Ex-Employee

Charges Credits

Balance forward from statement		
furnish employee Bahrein Island, 55		
Rupees 7 Annas		\$ 16 90
Travel Expense account		71 00
Bapco Club Account	\$18 79	
Cash withdrawn	7 62	
Laundry & dry cleaning	.76	
Accommodation Expense Cairo	5 00	
Transportation Expense Port Said	4 40	
Embarkation & Incidental Exp. " "	6 81	
Steamship Fare to U. S. A.	151 47	
Cash advance U. S. against travel Ex-		
penses	30 00	
Egypt Entry visa	2 13	
Salary withheld 7-1 to 7-10-44		127 16
	<hr/>	<hr/>
	\$226 98	215 06
	215 06	

Balance Due Compania-Constructora \$11 92*

*Above balance does not include ATC plane fare from Jolisite to Cairo. If we are billed by the A.T.C. for this fare there will be an additional charge of \$169.44.

(Plaintiff's Exhibit No. 3)

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 3. Filed Oct. 2, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

Mr. Chance: May I have permission to substitute a copy for this one? This is the only one that I have.

The Court: If there is no objection you may.

Mr. Sheridan: I do not desire a copy of it. I will stipulate it may be withdrawn.

The Court: You mean a substitute copy for the record? [178]

Mr. Chance: Yes, your Honor.

Mr. Sheridan: The plaintiff rests at this time, your Honor.

The Court: You may proceed, Mr. Chance.

Mr. Chance: Mr. McAuliffe, will you take the stand, please?

J. ROY McAULIFFE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: J. Roy McAuliffe.

Direct Examination

By Mr. Chance:

Q. What is your residence address, Mr. McAuliffe?

A. 165 St. Lucia Avenue, Alameda Park, California.

Q. What is your occupation?

A. I am project manager for, at the present time, Bechtel-McCone Corporation.

(Testimony of J. Roy McAuliffe)

Q. And who is your—strike that. Who was your employer immediately preceding your present employment?

A. Constructora Bechtel-McCone, South America.

Q. What was your position with that company? [179]

A. I was project manager at the work on Bahrein Island.

Q. How long were you employed in that position?

A. I was on the island from February, 1944 to the end of July, 1945.

Q. What was the nature of the construction work at Bahrein Island during the time you were project manager?

A. I went over there for the sole purpose of constructing the aviation gasoline project.

Q. And that was done for an oil company?

A. Yes, the Bahrein Petroleum Company, Limited.

Q. While you were there was the major part of the construction work of the gasoline refinery facilities undertaken and completed?

A. They were completed and accepted.

Q. And did you complete your contract with that construction company? A. Yes, sir.

Q. How long have you been engaged in the construction of oil refinery, chemical and like plants?

A. Well, I started with Stone and Webster when I was discharged from the last war. That would be in 1919. Prior to that time I had been mostly in municipal and highway and railroad work.

Q. Stone and Webster are construction engineers of [180] chemical plants and refinery plants?

A. Yes, sir. They are nationally known engineers and contractors.

(Testimony of J. Roy McAuliffe)

Q. And have you since been continuously engaged in the same line of work? A. Practically so.

Q. Who was immediately under you on—strike that. As project manager were you in complete charge of construction work on Bahrein Island for the South American Company? A. I was.

Q. And who was immediately under you?

A. I had three men directly under me. One was my assistant, and I had two general superintendents.

Q. Who were they?

A. The assistant was Harold Vessels, and the general superintendents were Walt Hillman and Frank Regan.

Q. What was the position of Harold Vessels?

A. Harold Vessels was my assistant. He was mostly in administrative work on the project. He took care of any details I couldn't look after.

Q. Assistant project manager?

A. Yes, that was his title.

Q. And under the two general superintendents what was the next order in the organization on the island? [181]

A. Directly under the general superintendents were the general foreman in charge of their several crafts such as carpenters, boilermakers, iron workers, riggers, and so forth.

Q. You had a number of general foremen?

A. Yes.

Q. Each in charge of the work on a particular department?

A. Each one in charge of his own department or craft.

(Testimony of J. Roy McAuliffe)

Q. And you had a general boilermaker foreman in charge of the boilermaker department? A. I did.

Q. What was his name? A. Ed Gratz.

Q. Now, under the general boilermaker foreman what was the next order in the organization?

A. There would be foremen. We had several. At that time there were probably three, maybe three or four foremen.

Q. Three or four boilermaker foremen?

A. Yes.

Q. And then there were foremen in other departments such as carpenters and so on?

A. On each division we had a foreman under the general foreman of that craft. [182]

Q. And was Leon Tam one of the three or four boilermaker foremen under Ed Gratz? A. He was.

Q. During the year 1944?

A. He was, entirely throughout the project.

Q. You knew Leon Tam, did you?

A. Very well.

Q. And did Leon Tam have boilermakers under his supervision? A. Yes, he did.

Q. Approximately how many would you say?

A. Well, that fluctuated. Our maximum boiler-maker crew on the job was probably 90 men and Tam had all the, practically all the column and vessel work. I couldn't tell you exactly. He may have had up to at one time or another 30 or 40 men under his direction.

Q. Thirty or forty boilermakers?

A. Boilermakers, yes.

(Testimony of J. Roy McAuliffe)

Q. And did each boilermaker have a crew of Arab day laborers assigned to him?

A. Yes. The ratio on the whole project ran about 1 to 4 and a half. It depended on exactly what work they were doing as to how many Arabs they had.

Q. How many, approximately, would each boilermaker have of Arabs under him? [183]

A. That varied because tank work—they might have 15 or 20 or 25, but on vessel work it was probably down anywhere from 3 to 5.

Q. And what were the duties of these Arab native day laborers under a boilermaker?

A. They did all the manual work such as handling materials and fetching and carrying handling tools to the boilermakers. They did everything except the actual mechanical work. They were not mechanics. In other words, they were helpers and laborers.

Q. What authority, if any, did the boilermakers foreman have during the year 1944, particularly in July, 1944, with respect to discharging boilermakers working under that particular foreman?

A. No foreman had any authority to discharge. He had the authority to take the man off of a job and send him to the general foreman with his recommendations.

Q. And then the general foreman, what authority did he have in that regard?

A. The general foreman had authority to discharge subject to—in all cases on the job discharge was subject to my written approval. I might say that I approved any discharge the general foreman recommended.

(Testimony of J. Roy McAuliffe)

Q. Did Leon Tam have any authority to discharge boilermakers working under him in July of 1944? [184]

A. He did not.

Mr. Sheridan: I did not hear the last statement of the witness in answer to the prior question.

Mr. Chance: Will you read the answer, Mr. Reporter?
(Answer read.)

Q. Are you familiar in general with the process of assembling approximately 20-ton sections of a bubble tower that were used during the year 1944 on Bahrein Island on this construction job?

A. Yes, I am.

Q. You observed the method that was employed?

A. Yes.

Q. Will you describe the method that was used in the assembly of the several sections of the towers, approximately 150 feet high and 12 feet in diameter and generally referred to as a bubble tower or towers of like size and weight and height?

A. Yes. This particular tower happened to be the heaviest one we had on the project. It was the heaviest lift and we handled it a little different than the small ones. First off, we prepared a cradle to set the sections on. The sections were delivered in the immediate area adjacent to where they were going to be assembled, which was some 300 feet from where the tower was going to be erected and it was assembled in a line pointing directly to the foundation upon [185] which it was going to be set.

The sills were carefully prepared at a given elevation so they were all level, and then these cribs were built up. First, by heavy sections set on it and lined up so the continuity will take care of the foundation right through.

(Testimony of J. Roy McAuliffe)

Then the next step after they got the one section set is to progressively pick up another section and lift it with the crane and set it on the crib and line it up, tack it and weld it to the section already in place and that follows progressively from the first section until the column is completed.

On that particular column we used, I forget which crane, one of the heavier cranes, and the section would be swung over to a point fairly close—I will say within 12 or 18 inches to the piece already in place, and then turnbuckles were used to pull the column up, that section of the column up closely adjacent to the other one. In order to space it they used welded plates on at various places around it so it will come up and butt it. Then the crane was released and the turnbuckles were released and then the welders went to work fitting up the sections. They had to work around the circumference to bring it adjacent. They had to bring the sections into alignment and that final drawing up was accomplished by key plates. Those are plates that are tacked to the shell and a bar is driven in by a wedge and that is [186] brought exactly to the point they want it. Of course a column that height has to be closely lined up or it will be out of plumb and is carefully worked out. The fitting is the largest job and then the welding was carefully fitted and correctly fitted in the welding process.

Q. The job of the boilermaker was, then, to bring the new section into juxtaposition with the sections already assembled?

A. That is right.

Q. And fit up the ends of the new section so that they were true with the section to be joined and to bring

(Testimony of J. Roy McAuliffe)

the sections as close as necessary for the purpose of welding, is that correct? A. That is correct.

Q. And then there were welders who picked up the job from there and completed the assembly by welding the two sections together?

A. That is correct. We had skilled welders for that purpose.

Q. Did you observe whether or not turnbuckles were used by boilermakers on the assembly of the bubble tower, this large bubble tower to which you have referred, in the construction of the refinery on Bahrein Island?

A. On that particular column I could not say right now whether I observed them or not. That was our custom. I [187] would say that we did, but it would be hearsay, because right at this minute I could not say actually I visualized and saw the turnbuckles, although I did climb around the column and noticed the key plates.

Q. Would you say from your observation of the assembly of towers of the character of this bubble tower that McDonald worked on and that Tam supervised on Bahrein Island, that it was customary to use turnbuckles in conjunction with key plates and other tools in assembling the sections? A. It was.

Q. You observed that as the customary practice on Bahrein Island during the year 1944?

A. That is right.

Q. Did you know Doyle McDonald?

A. I knew him just on the job. I did not know him previously.

Q. That was the first time you met him?

A. Yes. Well, the first vivid recollection I have of meeting him was the day he came to me at the office in

(Testimony of J. Roy McAuliffe)

front of the construction office. I may have met him before that and don't remember it.

Q. Have you heretofore fixed the date in your mind as to when you have this vivid recollection of meeting him when he came to the office?

A. To the best of my memory it was sometime in July, [188] 1944.

The Court: You evidently met him when the contract of employment was signed on May 28th.

The Witness: Not necessarily, Judge, because men signed the contract in one room and I signed it in the other room.

The Court: Your signature is attached to this contract?

The Witness: Yes, that is my signature.

Q. By Mr. Chance: Maybe you would sign a number of contracts in one day when the men arrived, is that right?

A. That is right.

Q. But you would not necessarily meet the man when he arrived?

A. No. I endeavored to meet the men when they arrived, not at the signing of the contract, but when they were processed. They were usually processed down in the mess hall. I don't remember the date we started that. I tried to make it a point if I were free to go down and meet the men and become acquainted with them before they ever went to work, but in this particular case I don't remember whether I met Mr. McDonald or not prior to the time he came to the office.

Q. Now, do you remember the circumstances of this meeting with Mr. McDonald in July of 1944?

A. Yes.

(Testimony of J. Roy McAuliffe)

Q. State what they were, please. [189]

A. Mr. McDonald came to me at the construction office and informed me or requested to be transferred and I asked him why. He said he could not get along with his foreman.

Q. Did he mention who his foreman was?

A. Yes, Tam, Leon Tam.

Q. What did you say?

A. I told him that just on the spur of the moment I would not give him an answer; that our policy was strongly objecting to transferring men around because we have no authority on the job and we wouldn't get our work done. We were over there to do a certain job and a certain foreman would be assigned to certain work and the men were assigned to the foremen, and in order to have an organization they would have to work that way, but I would not give him a yes or no answer. I would investigate the circumstances. So I told him I would check it up and asked him to come back the next day.

Q. Was anybody else present at this conversation besides yourself and Mr. McDonald, to your recollection?

A. Not to my recollection. I don't remember.

Q. You don't remember whether anyone else was present or not?

A. No, sir, I don't

Q. What time of the day would you say that occurred? [190] Have you any recollection of the time?

A. No, I couldn't say that.

Q. Did you make an investigation after you had this discussion with Mr. McDonald, the first one?

A. I definitely did.

Q. And did you make inquiry of anyone?

A. Yes. I spoke to both Mr. Tam and Ed Gratz.

(Testimony of J. Roy McAuliffe)

Q. Following your inquiries of Tam and Gratz, did you issue any instructions or give Mr. McDonald any reply?

A. I issued instructions that McDonald go back to work.

Q. When did you do that?

A. To the best of my memory, the following morning.

Q. Did you do that personally or did you do that through someone else?

A. That I could not answer. I may have done it through Vessels, although I thought that I did it myself. My best recollection is that I did it personally. I said it personally to McDonald, but that is quite a while ago and I had so many men. I might have passed it on to one of my assistants as well as telling him myself.

Q. Did Mr. McDonald go back to work pursuant to the instructions you issued? A. He did not.

Q. What did he do to your knowledge? [191]

A. To my knowledge he walked off the job.

Q. Did you sign any letter in relation to the occurrence that you have just related—that is, the termination of Mr. McDonald's employment at or about that time?

A. I probably did. I signed most of the termination notices.

Mr. Chance: I show counsel a letterhead of the *Compania Constructora*, Bechtel-McCone, South America, being a copy—counsel states he has the original of this letter.

Q. I will ask you if that document, if the original, was signed by you on or about the date it bears?

A. I could not say positively unless I saw the original. It might have been signed with my signature by my assistant.

(Testimony of J. Roy McAuliffe)

Q. I will show you this. Is that your signature?

A. Yes, that is my signature.

Q. Did you cause this to be delivered to Mr. McDonald about the date that it bears? A. That is right.

Mr. Chance: We will offer in evidence as defendants' next in order, the photostatic copy of this letter dated July 10, 1944, with the statement that the original, which counsel for the plaintiff has handed me, bears the signature of J. Roy McAuliffe on the line above the typewritten signature. That is the only difference between the photo- [192] static copy that I am introducing.

Mr. Sheridan: I would prefer you introduced the original.

Mr. Chance: Then I will withdraw the offer and offer to put the original in evidence.

The Court: On the stipulation just made it will be admitted in evidence.

(The document referred to was marked as Defendants' Exhibit B, and was received in evidence.)

[DEFENDANTS' EXHIBIT B]

COMPANIA CONSTRUCTORA
BECHTEL-McCONE-PARSONS, S. A.

Awali, Bahrein Island, Persian Gulf
July 10, 1944

Doyle McDonald
Awali
Bahrein Island

Dear Sir:

Reference is made to your resignation from the Service of the Company, effective C. O. B. July 10, 1944.

(Defendants' Exhibit B)

It is anticipated that air transportation will be available for you to leave Bahrein for Cairo in the very near future and you should make yourself ready to depart on that basis. You will be allowed to take with you fifty-five pounds of baggage. If you have additional luggage, please prepare a list of contents in duplicate showing estimated values and address to which shipment should be made, and leave this list at the Personnel Department. This baggage will be forwarded to you by first available boat and at your own risk and expense.

Upon your arrival in Cairo, please get in touch with Mr. Joseph X. Causley, Shepheard's Hotel, who will make available to you if desired, transportation to the United States. Please note that in accordance with Clause XII (b) of your Employment Agreement, all cost of such transportation arrangements made on your behalf is at your expense. Also, all hotel, living and any and all other expenses incurred by you enroute from Bahrein Island to the United States are your responsibility.

You will be carried on the payroll at Bahrein up to and including July 10, 1944.

Yours very truly,

J. Roy McAuliffe

J. ROY McAULIFFE,

Project Manager

JRMcA:d

cc: V. G. Hindmarsh

J. X. Causley

File

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Defts. Exhibit B. Filed Oct. 2, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

(Testimony of J. Roy McAuliffe)

Mr. Chance: I would like to call the court's attention to several sentences of this letter dated July 10th. In the first sentence reference is made, "to your resignation from the service of the company, effective C. O. B. July 10, 1944," and then the instructions with respect to his departure and his travel home and then the next to the last sentence I call particular attention to: "Also, all hotel, living and any other expenses incurred by you en route from Bahrein Island to the United States are your responsibility." And I am referring the court there to Clause 12-b of the employment agreement.

Q. Did you know what, if any, instructions had been issued by Leon Tam to Mr. McDonald the afternoon before you had your conversation with McDonald concerning his termination? [193]

A. Yes; because I talked to Tam to find out what the trouble was.

Q. And you knew then that it was an instruction to get turnbuckles to be used for the assembly of a section of this bubble tower that McDonald was working on?

A. I knew about that much. I did not know all the details. I knew that Tam had issued instructions to McDonald to get the tools for the work and that they had had words and then McDonald told me when he came to me he would not work for Tam, he could not get along with him and wanted a transfer.

Q. Did you in your opinion, with your experience, was it a reasonable instruction on that afternoon preceding your conversation with McDonald for Tam, the foreman, to have ordered or instructed McDonald to procure turnbuckles to be used on the assembly of that section? A. It was entirely reasonable.

(Testimony of J. Roy McAuliffe)

Q. Was Mr. Tam a satisfactory and competent boiler-maker foreman in his work during his employment on Bahrein Island during the years 1944 and 1945 while under your supervision?

A. Mr. Tam was a highly skilled boilermaker foreman. He had a very excellent record and made a very fine showing on the job. He had charge of it right up to the completion of the work. It was [194] very important work and he was entirely satisfactory. Prior to his work there, to my knowledge, he had had a very fine record with the Standard Oil Company both in the field and in the shop. His work has always been boilermaker work and he has been foreman for many years.

Mr. Chance: No further questions.

Cross-Examination.

By Mr. Sheridan:

Q. Mr. McAuliffe, did you know Doyle McDonald during the time he was employed at Bahrein Island?

A. Yes

Q. Were you in position to know the character of work that Mr. McDonald did?

A. Yes. I was out and saw the work he was working on.

Q. What was the quality of the work that he was doing?

A. That I can't say except that he was told to go to work so he must have been satisfactory enough that he was getting along with his work.

Q. Well, did you see the work that he was doing?

A. I saw it, but I didn't observe it as to quality. I saw the work going on all over the project.

(Testimony of J. Roy McAuliffe)

Q. Did you in your supervisorial capacity ever hear objections made to the quality of work that Mr. McDonald did? [195]

A. Except at the time McDonald came and explained about working for Tam.

Q. That argument wasn't over the quality of Mr. McDonald's work, was it?

A. That point came up because when I spoke to Tam about this man being transferred, Tam at that time told me that in his opinion McDonald's work was not very satisfactory; that he would continue to work him but he didn't consider him a first-class mechanic by any means.

Q. But this opinion was expressed by Tam the day after this heated altercation, was it not?

A. Either the day after or the same day. The day I spoke to Tam I spoke to him.

Mr. Sheridan: I want to introduce this as the plaintiff's exhibit next in order, which is an order issued by the Compania Constructora to Captain C. P. Judy of the Air Transport Command in substance stating:

"The services of the above named have been terminated by this company and we request air transportation to get him outside. J. Roy McAuliffe."

Also offer the plaintiff's exhibit next in order what is denominated "Air Transport Command Priority Identification Certificate," signed by J. Roy McAuliffe, and countersigned by Doyle McDonald on the 10th of July, 1944. [196]

The Clerk: Plaintiff's Exhibits 4 and 5.

Mr. Chance: I stipulate they may be introduced and received.

(The documents referred to were marked as Plaintiff's Exhibits 4 and 5, and were received in evidence.)

[PLAINTIFF'S EXHIBIT NO. 4]

COMPANIA CONSTRUCTORA .
BECHTEL-McCONE-PARSONS, S. A.

Awali, Bahrein Island, Persian Gulf
July 10, 1944

Captain C. P. Judy

Commander

A. T. C., Bahrein Island

Subject: Doyle McDonald

Dear Sir:

The services of the above-named have been terminated with this Company, an organization which is engaged in direct connection with the war effort. It is of decided advantage to the project to secure air transportation from Bahrein to Cairo for the above individual in order to eliminate the long delay which is being experienced in securing transportation by sea from Bahrein Island. Your approval is requested.

Yours very truly,

J. Roy McAuliffe

J. ROY McAULIFFE,

Project Manager

JRMcA:d

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 4. Filed Oct. 2, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 5]

RELEASE

Bahrein Island

Persian Gulf

(Place)

July 10, 1944

(Date)

Know all Men by These Presents: Whereas I
Doyle McDonald am about to take a flight or flights as
(Full-Name)

a passenger in certain Army Aircraft on or about July
(Date or Dates)

11, 1944 and whereas I am doing so entirely upon my own
initiative, risk and responsibility; now, therefore, in con-
sideration of the permission extended to me by the United
States through its officers, and agents to take said flight
or flights, I do hereby, for myself, my heirs, executors,
and administrators, remise, release, and forever dis-
charge the Government of the United States and all of
its officers and agents, acting officially or otherwise, from
any and all claims, demands, actions or causes of action,
on account of my death or on account of any injury to
me which may occur by reasons of the said flight or
flights.

The term "flight or flights" as used herein is under-
stood and agreed to include the preparation for, continua-
tion, and completion of flight or flights whether or not
one or more than one aircraft is used throughout the
entire flight or flights, as well as all ground and flight
operations incident thereto. It is further understood and
agreed that this release, among other things, extends to

(Plaintiff's Exhibit No. 5)

and includes negligence, faulty pilotage, and structural failure of the aircraft thereof.

The execution hereof does not operate to waive any statutory right conferred by act of Congress.

Doyle McDonald
(Signature)

Jas. R. Davis
(Witness)

(Witness)

In Case of Emergency Notify

E. Outheir
(Name)

1235 Cedar Apt. E2
(Address)
Long Beach Calif.

ATC-PT-42

AIR TRANSPORT COMMAND
PRIORITY IDENTIFICATION CERTIFICATE

Date July 10, 1944

Part I. Certification of Sponsoring Agency

Authority is hereby requested for Doyle McDonald
(Print name here)

Boilermaker to travel on Air Transport Command air-
(Grade or title)
craft from Bahrein Island to Cairo, Egypte via Abadan
on or about July 11, 1944.

Permanent address 1235 Cedar Apt. E-2, Long Beach,
California

Local address Awali, Bahrein Island, Persian Gulf
Phone

Employer and/or Government Department or Agency
sponsoring the travel C. C. Bechtel-McCone-Parsons,

(Plaintiff's Exhibit No. 5)

S. A. Reasons for travel To avoid difficulties in securing boat transportation from Bahrein Island

Latest time of arrival at destination to successfully complete mission

I hereby certify that the movement of this passenger is necessary and essential to the successful prosecution of the war, and that the mission of this passenger is of such urgency that air transportation is necessary.

C. C. BECHTEL-McCONE-
PARSONS, S. A.

(Govt. Dept. or Agency)

J. Roy McAuliffe

J. ROY McAULIFFE

(Signature)

Project Manager

(Rank or Title)

Part II. Passenger Signature: I certify that it has been brought to my attention that failure to appear for transportation after definite space has been assigned will automatically forfeit priority for travel.

Doyle McDonald Boilermaker

(Passenger signature) (Rank or Title) (Organization)

Doyle McDonald

Part III. Priority Approval

Priority Authorized Channel

Identification No.....Baggage Weight.....Number.....

Philip C. Morse Jr.

(Signature of Priorities & Traffic Off.)

Sta #15

11 July 1944

Capt A C

(Station)

(Date)

(Rank, Grade or Title)

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 5. Filed Oct. 2, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

(Testimony of J. Roy McAuliffe)

Q. By Mr. Sheridan: Now, Mr. McAuliffe, on what date did this altercation between Mr Tam and Mr. McDonald take place?

The Court: I think it is agreed it was July 9th. The evidence is uncontradicted that that was the date.

Q. By Mr. Sheridan: If the argument between Mr. Tam and Mr. McDonald took place on July 9th upon what date did you confer with Mr. McDonald in regard to this altercation?

A. Well, I testified that it was the following day after he came to me.

Q. Did he come to you on the date of July 9th, the date of the altercation?

A. Yes. He came to my office to the best of my knowledge.

Q. It is your testimony that the next day, or July 10th, you investigated this matter with Mr. Gratz and Mr. Tam?

A. I would not say July 9th or 10th. It was the day following his coming to me that I gave a decision. Whether [197] that was the 8th, 9th or 10th, I could not tell you.

The Court: Your letter is dated July 10th.

The Witness: That would be after the man resigned when that letter was written.

Mr. Sheridan: I move to strike that last answer, whether it was a resignation or not.

The Court: I suggested the letter because it might tend to refresh your memory.

The Witness: It would not be written until after he had left. I might add that every man that leaves the island leaves with a letter of termination—either a letter

(Testimony of J. Roy McAuliffe)

of resignation or discharge or completed contract, and no man leaves the island without one of those three letters and a letter is never written until such time as an employee is terminated. You might write an expiration of contract ahead of time, but resignations or discharges would be impossible to write ahead of time.

Q. By Mr. Sheridan: Now, Mr. McAuliffe, isn't it a fact that the conversation you had with Mr. Gratz and Mr. Tam took place the day after the altercation?

A. To the best of my knowledge either the same day or the following day. One or the other.

Q. Wasn't it your testimony that you had this conversation with Tam or Gratz the day following the altercation?

A. No. I said I gave my answer the day following the [198] altercation.

Q. And what was your answer that you gave the day following the altercation?

A. That Mr. McDonald could not be transferred; he would have to go back to work under the foreman to which he was assigned.

Q. Did you personally tell Mr. McDonald that he was to go back to work or did you send him written notification of that?

A. I didn't send him written notification. I testified that I either told him personally or gave the instruction through one of my subordinates. ,

Q. What subordinate would that be?

A. Either Vessels, Hillman or Regan. Those would be the most likely three.

(Testimony of J. Roy McAuliffe)

Q. Now, Mr. McAuliffe, what hours did the coolies on the job work?

A. Well, the normal hours—they worked the same as the staff men.

Q. If they went to work at 4 o'clock in the morning they worked from 4 o'clock in the morning until two?

A. They either worked straight time or overtime, depending on the staff men.

Q. Did the coolies work any overtime at all?

A. Oh, yes, a great deal. [199]

Q. Isn't it a fact it was the policy of the company not to work the coolies overtime?

A. No. We worked the coolies—I think our records will show we worked them up to 25 percent overtime.

Q. Wasn't it a fact that—

A. I might say it was hard to work them overtime because they didn't want to work. They didn't want to work normal time even.

Q. Wasn't it a fact that it was the policy of the company not to work overtime because it inflated the Arabian currency?

A. No. If there was any policy at all it was because they couldn't get the work out of them.

Q. You couldn't get work out of them straight time?

A. We had to work them because they were the only helpers we could get.

Q. It was impossible to get much work out of them at any time?

A. It was difficult.

Q. Now, Mr. McAuliffe, calling your attention to—we have stipulated this is a drawing of a vessel comparable to the one which we are speaking about. This particular vessel we are concerned with in this particular

(Testimony of J. Roy McAuliffe)

case was one which did not have the top on it as yet, did-it?

A. Because in this construction we are starting from [200] the bottom of this tank and building toward the top.

Q. And that which appears to be the top of the tower was not yet assembled during the time involved in this action?

A. I don't remember exactly but oftentimes we do not put the skirt on—that is the section it fits on at the bottom until—

Q. Well, your recollection is that the operation that was being performed at that time was the joining of the various 20 foot sections of the tower together, was it not?

A. That is right.

Q. And it wasn't a matter of finishing up the tower or anything like that. They were trying to get the tower together and then they would complete the ends and then erect the tower, isn't that true?

A. That could be, yes.

Q. Now, Mr. McAuliffe, you stated you were out on this job and you watched the construction of this tower, isn't that true?

A. Yes. I passed by it, oh, maybe several times a day because we were short of men at that time. That was one of our major columns and naturally we were anxious to get it assembled and erected.

Q. On this particular tower do you have any independent recollection as to what the position of the cribbing under [201] the tower was? Was that cribbing

(Testimony of J. Roy McAuliffe)

laid underneath the tower laterally or was the cribbing laid in a longitudinal direction?

A. Well, the cradle itself, of course, would be laid transversely. I couldn't answer that question.

Mr. Chance: For the witness' information you might tell him that we have agreed with Mr. Tam that the drawing is not precise as to the cribbing.

The Witness: I don't doubt that. That is an artist's sketch.

Q. By Mr. Sheridan: Your testimony is the cradle would be substantially as this is represented here?

A. It depends on whether the vessel is partly rolled or snubbed in the cradle. I don't remember, but you would have a transverse bearing across this way in any event.

Q. But the matter of the cribbing was that the cribbing went in a longitudinal direction and the cradle in a lateral direction, isn't that true?

A. Normally that is the way it is done.

Q. But the cribbing itself was in a longitudinal direction from the front to the end?

A. I could not swear to that, but I would think that is the way it was. Normally these vessels are rolled. This one was too large to do much rolling. They turn them to weld them but this vessel was too large to roll in the customary manner. I do not remember the exact details of the [202] cribbing. I might say I did not go into the detail of construction when I was out there. It was more policy matters.

Q. Your job was establishing policy and administration?

A. Yes; I administered the organization and the function of the project as a whole rather than any details.

(Testimony of J. Roy McAuliffe)

Q. But your job certainly wasn't a hammer and tongs job? A. That is right.

Q. You were handling the personnel and getting the whole job done?

A. I was responsible for the entire job—not any detail.

Q. Mr. McAuliffe, were you ever present when one of these sections of the bubble tower was swung into shape and the preliminary job of tightening it up was done?

A. I don't believe I was. I have passed there when they were ready to take sections but I don't remember actually being at the site of the column when they set a section and completed the operation. I have seen it at various stages of the operation. I have seen it on the ground and laid in place or brought up together and fitted up and the key plates, but I never stood there long enough to watch the operations go through.

Q. Have you ever been there at the preliminary point [203] when the sections were just being brought together?

A. That is the point I just tried to make. I don't believe that I recollect now that I actually was there at that time.

Q. Did you ever formulate or issue any company policy that in the joining of sections a particular device should be used?

A. No. That would not be my function to do that unless they were doing it wrong that I knew of.

Q. If it was erroneously being done you would issue an order, would you not? A. That is right.

Q. For the efficiency of the job?

A. If it came to my attention.

(Testimony of J. Roy McAuliffe)

Q. But you had the power if there was a stupid procedure being utilized to change it, did you not?

A. Oh, certainly.

Q. But as far as you know you had never issued any orders for the use of turnbuckles or any particular type of device in joining these tower sections together?

A. It wasn't necessary for me to do that because that is the regular procedure of the boilermaker foremen.

Q. Have you ever seen key plates used?

A. Oh, yes. Used key plates not only on that vessel but many others and on the construction of the large regenera- [204] tors for the cracker is all key plate construction.

Q. Is it necessary for key plates to be used in order to perform the job?

A. For the final setup the key plates are essential. You cannot get along without them.

Q. Is it possible to bring up the final assembly of a vessel like this with turnbuckles?

A. If you are lucky and just happen to hit it right, but oftentimes the sections do not match exactly and it is so hard to get them to match. If you don't have a perfectly square cut at the end you will have one side of your vessel maybe opened up more than the other and you have to make a perfect alignment and you go around on these key plates and keep wedging in your pins until you get that just exactly right.

Q. With the key plates you can do that?

A. That is the final adjustment.

Q. With the turnbuckles it would be more or less—

A. Turnbuckles are not used for that purpose, if that is what you are driving at. The turnbuckles are just to bring it up there approximately in place and then take

(Testimony of J. Roy McAuliffe)

over with key plates. The turnbuckles are used primarily to speed the job up so you don't have to keep a crane standing there waiting all the time. You do that to release the crane and everything else. [205]

Q. Now, Mr. McAuliffe, do you have any idea or any opinion as to how long it would take to put on the ears and lugs and apply a one-inch turnbuckle to each side of the vessel and to tighten it up so that the 20-ton portion of the vessel would be attached to the rigid portion of the vessel in order to complete the job and allow the Walkathon Crane to be released?

A. That is not much of a job if you have the material there.

Q. How long would it take to do it?

A. Oh, I would say anywhere from 20 minutes to three-quarters of an hour.

Q. And in that 20 minutes or three quarters of an hour you would be required to tack on the ears and lugs and things?

A. That is assuming that you have got your crane there and everything and your sling and you just go ahead and tack your lugs on and put the turnbuckles on and pull them up and release your crane.

Q. It would take 25 minutes to three quarters of an hour if you had the material there and ready to go?

A. I said 20 minutes to 45 minutes. You understand I am speaking roughly. I am not a mechanic. I am just talking in generalities.

Q. That would require that everything be in place, the [206] crane, the cradle already rigged?

A. That is right.

Q. And the sling would be rigged, would it not?

A. Well, very likely if you had the crane there.

(Testimony of J. Roy McAuliffe)

Q. Wouldn't it take even more time than that to rig the sling?

A. Takes a very little time to put a sling on there. It is just a case of running it around and hooking it.

Q. You had to put blocks under it to protect the sides of the vessel?

A. I don't know whether they used one sling or two slings. It depends on the shell. There is danger of crushing the vessel if it is of light construction.

Q. This is a 20-ton section, isn't it? A. Yes.

Q. And that is a 50-ton Walkathon Crane, is it?

A. It is not a Walkathon if it is a 50-ton crane. It would be a Manitowak.

Q. A 50-ton crane?

A. Yes, the Manitowak is a 50-ton crane. It is the damage to the vessel I am speaking about, crushing it with your slings.

Q. But there is not much danger of crushing a vessel made of 1 and 1-8th steel? A. No. [207]

Q. Mr. McAuliffe, were you ever on the bubble tower at the time that McDonald was working on it?

A. Why, I probably was, although I don't remember seeing McDonald actually on that spot.

Q. You didn't know him well enough to have your attention called to him?

A. No, not until he came to see me.

Q. Do you know if any other boilermakers worked on building the bubble tower prior to McDonald leaving Bahrein Island?

A. Naturally there were other boilermakers working on it.

Q. Do you know of your own knowledge that there were others? A. Yes, I employed them.

(Testimony of J. Roy McAuliffe)

Q. Who were assigned to the bubble tower and doing the job of fitting it up?

A. Well, now, you are asking me a question whether anybody actually did McDonald's particular job there?

Q. That is right—that is what I am directing my questions to.

Mr. Chance: Object to the question as being unintelligible.

Mr. Sheridan: There is nothing unintelligible about that. [208]

The Court: Do you mean worked at the same kind of work before McDonald came and after he left?

The Witness: That is true, yes, indeed, we completed the work.

Q. By Mr. Sheridan: Do you know the names of any of those boilermakers.

A. Not offhand.

Q. Would you recognize them if I mentioned them?

A. I might or might not.

Q. Would you recognize the name of William Christianson?

A. No.

Q. Mr. McAuliffe, how long would it take, assuming that your materials were there and the job was ready to go, to apply your turnbuckles to the vessels, to the rigid side and the non-rigid side and take up your bars and draw the turnbuckles up to the point that the job would be ready for the key plates to be applied and the crane to be released?

A. I just testified from 15 to 25 minutes or three quarters of an hour to the best of my memory. I cannot tell you anything closer than that.

(Testimony of J. Roy McAuliffe)

Q. After applying the turnbuckles and tightening them up?

A. That is right. You asked about tacking them on and putting the turnbuckles on and pulling them up. [209]

Q. Now, Mr. McAuliffe, with regard to the altercation between Mr. McDonald and Mr. Tam, when did you first acquire any knowledge that there was an altercation between these two gentlemen?

Mr. Chance: Object to that as having been asked and answered.

The Court: I think it is repetitious. In addition to that, it has been agreed here that it was on the afternoon of July 9th. You may ask him if he saw him on that day or the next day.

Q. By Mr. Sheridan: Did you see Mr. McDonald on the day of the altercation or the following day?

A. Providing he came to me right after the altercation, as I understand the facts to be, he came to my office.

Q. When he came to your office was Mr. Vessels present? A. I don't remember.

Q. Do you ever recall Mr. Vessels being present and Mr. McDonald and yourself were conducting—had a conversation?

A. Yes, I do, but I do not remember the exact circumstances. Vessels and I were together a great deal. Being my assistant, we went around together a lot.

Q. Isn't it a fact the conversation you had with Mr. McDonald took place outside of your office? [210]

A. It could have.

Q. While Mr. McDonald was waiting for a bus to go back to Awali? A. It could have been.

(Testimony of J. Roy McAuliffe)

Q. But it isn't your positive testimony that the interview took place in your office?

A. No. At the office probably is what I should have said—inside or outside, but it was definitely at the construction office. I often talk to the men outside.

Q. And it is your recollection that Mr. Vessels was there sometime during your conversation?

A. Sometime during this period of altercation, or, rather, the discussion between McDonald and myself on this work. I would not say. As I testified, I don't remember him being there at any particular time.

Q. Then did you assign any part of the investigation of this matter to Mr. Vessels?

A. Not the investigation, no.

Q. You did that yourself?

A. I did that myself, yes.

Q. And with whom did you investigate?

A. Both the general foreman, Gratz, and McDonald's immediate foreman, Tam.

Q. Did you speak to Mr. Tam or Mr. Gratz first?

A. I don't remember. Probably spoke to Mr. Gratz [211] first because he was Tam's superintendent.

Q. At the time you spoke to Mr. Gratz did he have any knowledge of the altercation?

A. I don't remember.

Q. Did either Mr. Gratz or Mr. Tam recommend to you that Mr. McDonald be discharged?

A. No, they did not.

Q. Did you ask them what their recommendation would be in that regard?

A. No. I just asked them whether or not they were willing to transfer him. What I really—what I wanted to find out was the circumstances and to find out whether

(Testimony of J. Roy McAuliffe)

there was any justification for McDonald being transferred and naturally that brought out a discussion with them and neither one of them were favorable to a transfer and I wasn't either.

Q. Well now, Mr. McAuliffe, if either Mr. Tam or Mr. Gratz were dissatisfied with the quality of work that Mr. McDonald was doing or with his ability to get along with either of them as a supervising man on the job, wouldn't it be perfectly reasonable to assume that they would be glad to have him assigned to another job?

A. No.

Mr. Chance: Object to the question as being hypothetical.

The Court: He has already answered the question.

The Witness: No, it isn't true. That is not a true statement. [212]

Q. By Mr. Sheridan: What would be the truth in that respect?

A. The truth is the fact we had so much difficulty and expense in bringing a man from San Francisco or some place in the United States to Bahrein Island that we made every effort to work him when we had him there and there was no reason at all for us to wish to get him off the job unless he actually was creating disturbance and demoralizing the job in some way.

Q. If that is a fact, what objection did you have personally to transferring Mr. McDonald to another job?

A. Because it is very bad for an organization if all the men decide they want a transfer. The foreman wouldn't have any discipline at all in their work. They wouldn't have their orders obeyed and the work would be disorganized.

(Testimony of J. Roy McAuliffe)

Q. That is the basis of the policy on which you refused to transfer Mr. McDonald?

A. Unless there was a good reason for the transfer and I decided there was not.

Q. You saw no reason why he should be transferred?

A. That is right.

Q. And did you see any reason why he should be discharged? A. No.

Q. Now is it your testimony, Mr. McAuliffe, that you [213] verbally stated to Mr. McDonald that he was to return to work?

A. My testimony was I either stated it directly to Mr. McDonald or I issued instructions that Mr. McDonald was to be so instructed. I cannot testify truthfully whether I said it to McDonald or whether I told it to Vessels.

Q. But you don't know as a positive fact that you ever told McDonald himself? A. Personally; no.

Q. That he was to stay on the job?

A. I know definitely I issued the instruction but I cannot say I told him personally to do it.

Q. Would this instruction have been issued the day of the altercation? A. Very likely.

Q. Now, Mr. McAuliffe, isn't it a fact that on the 10th day of July, 1944, you were in Mr. Paine's office at the time that the termination of Mr. McDonald's services were being completed by the signature of the various papers and you came over to Mr. McDonald and shook hands with him and said, "I am sorry that I personally could not work this thing out."

A. No, I certainly did not. I would not say that. I did not see McDonald. I don't remember seeing him,

(Testimony of J. Roy McAuliffe)

but if I did I might have said, "I am sorry" all right, but I would [214] have said, "I am sorry you did not see fit to go back to work" or something like that, because I definitely did not have any knowledge of McDonald being discharged and to the best of my knowledge he just walked off of the job after being instructed to go back to work.

Q. That is just to the best of your knowledge?

A. Personally, as far as I am concerned, that is the way it was. I was the Project Manager and I issued those instructions and McDonald left the job and as much as anyone can be positive about anything that was the circumstances. Now, he did not come to me and tell me anything at all to the contrary, to my instructions, that somebody discharged him.

Q. Did you ever confer with Mr. Ed Gratz and ask him if he had ever stated to Mr. McDonald, "You are fired, you are through?"

A. No.

Q. "And that is for sure?"

A. No, it wasn't necessary. I went to Gratz first and investigated the case and then I issued instructions for the man to go back to work.

Q. But you did not ask Mr. Gratz if he had ever fired Mr. McDonald?

A. I beg your pardon. I think I probably asked it since that time but not at that time.

Q. Not at that time? [215]

A. No.

Q. At the time you investigated the case you did not ask him that?

A. I don't remember asking him that at all.

Q. Mr. Gratz had power to hire and fire?

A. He couldn't discharge without my signature.

Q. But he had the power to hire and fire?

A. Not to hire but discharge.

(Testimony of J. Roy McAuliffe)

Q. You did not ask him whether he fired Mr. McDonald or anything else, did you?

A. You have asked me a question and I don't remember.

Mr. Sheridan: That is all.

The Court: I want to ask you a question or two, Mr. McAuliffe. In your letter you say, "Reference is made to your resignation from the service of the company effective C.O.B. July 10, 1944."

Upon what did you base that statement?

A. On the fact that he walked off and evidently told the boys at the office.

But you had no written communication from him?

A. No.

Q. Nor personal communication from him directly?

A. Personally I don't think so. I don't remember McDonald coming back to me personally after he left the job. We may have spoken but I don't remember the circumstances if [216] we did.

The Court: Just what power did these foremen have, Tam and Gratz, with reference to employees?

The Witness: Well, Tam was a foreman and could turn the man into his general foreman, his superior. In other words, if the man was not satisfactory and could not do the work satisfactorily he would send him to the general foreman.

The Court: Could he advise them that as far as he was concerned and as far as they were members of a crew that they were discharged?

The Witness: Well, he could subject to the approval of the general foreman. In other words, if he reported to the general foreman he could recommend to the general foreman that the man should be discharged, and if the

(Testimony of J. Roy McAuliffe)

general foreman thought it should be that way he would approve it.

The Court: That is, Tam would make that recommendation to Gratz in this case?

The Witness: That is right.

The Court: That McDonald be discharged?

The Witness: That is right.

The Court: And then if Gratz took the position that McDonald should be discharged and notified McDonald to that effect—

The Witness: Then Gratz would notify me in the office.

The Court: And would you countermand his order? [217]

The Witness: Oh, yes. I could, but very seldom do, naturally. for organizational purposes, but all general foremen had very positive instructions from me, seeing that the job was so isolated, to be careful about handling men. We gave a man every consideration possible before resorting to a discharge. There was many reasons for that. The economics of the thing. It is a very costly matter to bring a man that far, take him half way around the world to get him over there and—

The Court: The court appreciates that situation, but, and counsel can check the court on this, my notes show that Mr. Tam testified yesterday that he was threatened by McDonald in this altercation and then McDonald said he was going to quit and he said, "Well, you are fired."

Now, what I am trying to get at is did Tam have the authority to tell him he was fired?

The Witness: No, he was just talking.

(Testimony of J. Roy McAuliffe)

Mr. Chance: May I call your Honor's attention to the fact—I believe what the witness Tam said was, "You are not going to work for me anymore." I don't think he said, "You are fired." My recollection of his testimony and in his deposition is that is the way he put it—"you are not going to work for me anymore."

The Court: You mean in Mr. Tam's deposition? [218]

Mr. Chance: Yes.

The Court: I made the note as he was testifying. There is not a very great difference, however.

Mr. Chance: The difference would be he wasn't going to work for him.

The Court: What I am trying to find out is whether he could do that—whether it meant anything.

The Witness: No, it did not. He was just talking. No foreman had the authority to discharge.

The Court: Did he have authority to say he would not work for him anymore and make that effective?

The Witness: Not unless the general foreman approved it.

Mr. Sheridan: But as a matter of practice wouldn't the general foreman approve it?

The Witness: Most likely he would, the same as I would approve the recommendation of the general foreman.

Mr. Sherman: To expedite the work and keep a happy working situation he would approve it?

The Witness: That would depend. I said in this case it would disorganize the work by transferring men. That is probably the same reasoning that Gratz used. If his men under his direction which, as I say, aggregated some 80 or 90 men toward the peak of the work, all decided they

(Testimony of J. Roy McAuliffe)

didn't want to work for their particular foreman he would not have any [219] organization at all.

The Court: Well, did you decline to transfer McDonald?

The Witness: I definitely declined to transfer him.

The Court: Did he request a transfer?

The Witness: Yes, he requested a transfer.

The Court: That is all the questions the court has.

Mr. Chance: No further questions.

Mr. Sheridan: Nothing further.

The Court: Inasmuch as we took no recess this morning we will adjourn at this time until two o'clock.

(Whereupon, at 11:45 o'clock a.m., a recess was had until two o'clock p.m. of the same day.) [220]

Los Angeles, California, Tuesday, October 2, 1945.

2:00 p.m.

The Court: You may proceed with the trial, gentlemen.

Mr. Sheridan: Your Honor, on the question of damages it is stipulated between counsel that there is a report prepared by the accountancy offices of Bechtel-McCone Corporation stating what the average cost was for moving men across the country from Los Angeles to New York would be for their first-class trainfare and then the trainfare from New York to Newport News, which was the point of embarkation, and also the cost of meals, tips, taxi fares and other incidentals for the five-day normal period of transcontinental travel which totals \$187.86. And it would be stipulated that that would be the normal fare that would be required in this particular case.

(Testimony of J. Roy McAuliffe)

Mr. Chance: That of course is subject to—I stipulate to those figures but they are subject, of course, to our objection that they are incompetent, irrelevant and immaterial on the overall ground of our defense.

The Court: Yes.

Mr. Sheridan: They are only introduced in case the subject of damages would become material. Of course that is understood.

The Court: I understand that.

Mr. Sheridan: It is further stipulated, your Honor, [221] between counsel that the earnings of Mr. Doyle McDonald are as they are presented according to a schedule which I submitted to the office of counsel for the defendants earlier in the process of this litigation. The schedule which is here appended is current up to the 13th day of May, 1945.

It is further stipulated by counsel for the plaintiff that this statement may be made up to date by taking the oral testimony of Mr. McDonald as to his earnings between the date of May 13th and the present date in order to determine what the measure of earnings would be by Mr. McDonald.

Mr. Chance: I so stipulate subject to the objection that it is incompetent, irrelevant and immaterial and on the general grounds and also on the particular ground that the earnings of the plaintiff subsequent to his termination of employment contract are entirely immaterial as to the proper measure of damages in the event your Honor gets to that point in the case, since the contract was terminable on 30 days' notice under Articles 9 and 12.

(Testimony of J. Roy McAuliffe)

I will be glad to argue the point, but subject to that objection I stipulate to these figures. We may be able to agree on the additional figures of his compensation subsequent to the date of May 13, 1944, as shown in this last exhibit.

Mr. Sheridan: I have stipulated already, counsel, we can take his oral testimony as to what those earnings would [222] be.

Mr. Chance: We might be able to shorten the hearing by getting together on that.

The Clerk: Plaintiff's Exhibits 6 and 7.

(The documents referred to were marked as Plaintiff's exhibits 6 and 7, and were received in evidence.)

[PLAINTIFF'S EXHIBIT NO. 6]

Normal first class train fare and lower berth

Pullman, New York to Los Angeles.....	\$144.81
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Train fare from Newport News to New York....	10.55
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\$155.36

Meals, tips, taxis and incidentals—5 days at

normal contract allowance of \$6.50 per day....	\$ 32.50
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\$187.86

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 6. Filed Oct. 2, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 7]

Summary of Doyle McDonald's earnings when employed by Star House Movers, Inc., Long Beach, California:

From October 1 to October 15, 1944	\$129.74
October 16 to October 31, 1944	181.94
November 1 to November 15, 1944	180.40
November 16 to November 30, 1944	165.71
December 1 to December 15, 1944	184.12
December 16 to December 31, 1944	160.33
January 1 to January 15, 1945	185.62
January 16 to January 31, 1945	123.11
February 1 to February 15, 1945	162.80
February 16 to February 28, 1945	153.75
March 1 to March 15, 1945	155.62
March 16 to March 31, 1945	199.04
April 1 to April 15, 1945	40.62

From April 22 to April 28, 1945, Doyle McDonald earned \$90.00 from the D & S Construction Company.

Commencing about May 6, 1945, Doyle McDonald was employed by United Concrete Pipe Corporation, Steel Shipbuilding Division, on which date he received a check for \$21.30.

May 13, 1945, he received from said employer \$82.84.

This is a summation of his earnings from October 1, 1944, to May 13, 1945.

[Endorsed]: No. 4549-O'C. McDonald vs. Bechtel-McCone. Plfs. Exhibit No. 7. Filed Oct. 2, 1945. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

Mr. Chance: Shall I proceed with the defense, your Honor?

The Court: Yes.

Mr. Chance: Mr. Paine, will you take the stand?

EARL PAINE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Earl Paine.

Direct Examination.

By Mr. Chance:

Q. Mr. Paine, by whom are you presently employed?

A. Army Air Forces, Western District, as Regional Supervising Auditor.

Q. For how long a period of time have you been so [223] employed?

A. Since the first of the year.

Q. Were you formerly, in the year 1944, employed by the defendant company, Compania Constructora Bechtel-McCone, South America?

A. Yes, sir.

Q. For what period of time were you so employed?

A. From March through October.

Q. Of 1944?

A. 1944.

Q. And were you on Bahrein Island during the period of March to October, 1944?

A. April to September.

Q. From April to September, 1944, you were on Bahrein Island?

A. That is right.

Q. And in what capacity did you serve that company during that period of time on Bahrein Island?

A. I was hired as office manager but acted as administrative manager.

Q. While you were on the island were you familiar with the plaintiff, Doyle McDonald?

A. I was.

(Testimony of Earl Paine)

Q. When did you first become acquainted with him, if you recall? [224]

A. My first contact with him was when I was called by the administrative manager to go see Mr. McDonald relative to why he did not appear on the job.

Q. About what date would be your best recollection that that occurred?

A. Well, I would hesitate to say because we had so many men that we were processing and terminating who were both coming and going from the job.

Q. I show you Plaintiff's Exhibit 5 in evidence in this case, and ask you if you have seen that document heretofore?

A. Yes.

Q. You are familiar with that document?

A. Yes, I am.

Q. Now, the date thereon is July 10, 1944. Would that assist you in determining approximately when you had your conversation with Mr. McDonald that you have referred to?

A. Yes. I would say that it was after the 4th of July—approximately around the 6th or 8th, along in there.

Q. Might have been later?

A. It could have been a day or two later. Could have been any time prior to that date.

Q. Any time between July 4th and July 10th, 1944?

A. That is right.

Q. Now, did you have occasion to prepare or assist [225] in the preparation of the material that is filed on this Plaintiff's Exhibit 5 at or about the date it bears?

A. That is right. That was the form for securing priority by the Air Transport Command to get civilian employees off the island and to Cairo, Egypt.

(Testimony of Earl Paine)

Q. In other words, you had to have one of these forms to secure such priority?

A. We had to process those through Air Transport Command before they would issue a ticket. They didn't issue tickets. It was merely a transportation right.

Q. The Air Transport Command was operating airplanes between Bahrein Island and Cairo, is that right?

A. That is right.

Q. Do you recall referring to the date of somewhere between July 4th and July 10th? Will you state the circumstances under which you had this conversation with Mr. McDonald?

A. I was called by the Project Manager, Roy McAuliffe, to go and call upon Mr. McDonald and find out why he didn't report for work, and this I did. I called on Mr. McDonald and asked him what the trouble was and he stated that he had had trouble with Mr. Tam, who was one of the superintendents on the job, and he would not work for him. And in our discussion when I mentioned to him, "Am I to assume that you are quitting if you don't report to work? I can't put much [226] other bearing on the matter," and as I recall—I believe I woke him up. He was rather sleepy and I think he was perhaps a little—a little befogged, you might say, from sleep, and I asked him to come to the office and prepare his Air Transport Command papers for transportation from the island.

We discussed something of his trouble with Mr. Tam and I told him that as far as I was concerned I had nothing to do with either hiring or firing anyone nor did I have any power over the men on the job whatsoever; that my position there was to expedite men to and from the island and to keep them there if it could possibly be

(Testimony of Earl Paine)

done. In the case of where a man had trouble with his family or something in camp away from a job, then it was within my power to assist them or straighten them out or terminate them if it should be required, but I referred him back to the job, either to Mr. Tam or Mr. McAuliffe, because as far as I was concerned my only business in calling on him was to ask him to go to work and then if he felt that he didn't want to work then it would be necessary for him to come up and terminate either voluntarily or by request.

That was followed by his coming to the office and processing out.

Q. By "processing out" you mean signing papers?

A. Preparing the papers. [227]

Q. For airplane transportation?

A. That is right.

Q. And did he sign this Plaintiff's Exhibit 5 at the time he came to the office for processing out?

A. That is right.

Q. I show you a signature, "Doyle McDonald" on the reverse side.

A. That is right.

Q. On the reverse side of this priority identification certificate, Plaintiff's Exhibit 5?

A. That is right.

Q. Is that the only document that you requested him to sign?

A. I do not recall if he had a foot locker and was going to ship the foot locker home. If so, he would have been required to sign that he would stand the transportation cost of the shipment of the foot locker home.

(Testimony of Earl Paine)

Q. That is his personal baggage?

A. His personal baggage. In many cases that was done. In this particular case I do not recall.

Q. I show you Defendants' Exhibit B in evidence, which is a letter addressed to Doyle McDonald, dated July 10, 1944, on Compania Constructora Bechtel-McCone, South America stationery, signed by J. Roy McAuliffe. Did you cause this document to be prepared on or about the date that it bears? [228]

A. That is right.

Q. And is that the form employed at that time by the company which you used in administering your duties where there was a resignation from service?

A. Yes, voluntary termination.

Q. Was there another type of form used by you in your duties when there was a discharge case involved?

A. Yes, it was very much this same form with the exception it stated that he was discharged from service and usually stated the reason why.

Q. After you had had your conversation with Mr. McDonald about this date or whenever it was you had this conversation with him, you prepared or caused these two documents, Plaintiff's Exhibit 5 and Defendants' Exhibit B, to be prepared?

A. Yes.

Q. In his deposition given on May 19th of this year in this action, Doyle McDonald testified as follows, and I read from this deposition. I am reading from page 29, line 16. He is relating—he has heretofore referred to a conversation with Mr. Gratz, one with Mr. Vessels, and one

(Testimony of Earl Paine)

with Mr. McAuliffe, and we fixed the date as July 10, 1944. I read:

"At the time they had changed employment managers, and Mr. Paine came down. I had been sick [229] off and on for some time, and I had gone to bed. He woke me up, and he said, 'Will you sign these papers you have been fired.' I said, 'I am sleeping right now. When do I get out of here?' He said, 'A couple of days.' I said, 'Put it off, I will come to the office and sign them, and I will go on to sleep. I would rather not be bothered now.' So he stood there and talked to me a while. 'Well,' he said, 'How do you want to sign, you are fired or discharged?' I said, 'It is very definite. You can't make anything else out of it but one thing. It is practically immaterial to me how I sign.'"

Then the question was asked:

"Fired or discharged?

"A. Yes, or quit.

"Q. Or resigned, did he use that expression?

"A. No, he said quit, I believe. I said, 'You can make only one thing out of it.' He said, I will fix it up.' So I didn't sign anything particularly that I recall, whether it was fired or discharged or quit."

Now, I want to ask you whether in the conversation referred to with Mr. McDonald down at his room at the camp on or about this date of July 10th, you woke him up and said to him, "Will you sign these papers? You have been fired?" Did you say that to him? [230]

A. No. I am afraid I would not start out that way with a man and wake him up that way.

Q. Your answer is you did not state that?

A. No, I did not.

(Testimony of Earl Paine)

Q. Did he say to you, "I am sleeping right now. When do I get out of here?" Do you recall?

A. I think that was sometime later in the conversation.

Q. He may have said that at some time?

A. He may have said it later in the conversation.

Q. Did you say, "A couple of days" meaning that he would get out of there in a couple of days, do you recall?

A. I don't recall having stated just those words, but it would have been approximately that time under any circumstances.

Q. You might have said that particular thing?

A. True.

Q. Did he then say to you, "Put it off; I will come to the office and sign them and I will go on to sleep. I would rather not be bothered now?"

A. That is right.

Q. He said that? A. Yes.

Q. Did you stand there and talk to him for a while and say, "Well, how do you want to sign? You are fired or discharged?" Did you say that? [231]

A. No.

Q. Did he say to you, "It is very definite; you cannot make anything else out of it but one thing. It is practically immaterial to me how I sign."? A. Yes.

Q. He said that? A. Yes.

Q. You recall him saying that?

A. That is right.

Mr. Chance: No further questions.

Cross-Examination.

By Mr. Sheridan:

Q. Mr. Paine, in regard to Mr. McDonald did you have any conversation with Mr. Vessels?

A. Yes, I did.

Q. Would you tell the Court what your conversation regarding Mr. McDonald was with Mr. Vessels?

A. Well, after talking to Mr. McDonald I got a hold of Mr. Vessels and asked him what sort of a man Mr. McDonald was on the job; if he should make any effort to keep him from quitting the job, which was customary under all circumstances of that sort, and he stated that he was an excellent man, a very good workman and that it was possible they wanted to keep him on the job but he said his trouble was with Mr. Tam [232] and he didn't know whether he could straighten that out or not. In any event if he went back to work he would have to report to his regular superintendent, who was Mr. Tam.

Q. He would have to report to Tam in any event?

A. That is right.

Q. As far as Mr. Vessels was concerned?

A. That is right.

Q. Mr. Paine, in the course of your duties you were handling personnel, were you not?

A. That is right.

Q. And it was your function to try to make conditions as happy for the men and the company as possible, was it not?

A. Yes, sir.

Q. In your duties did you talk to Mr. Gratz in regard to Mr. McDonald?

A. No, I didn't. I had a second conversation with Mr. Vessels relative to Mr. Gratz.

(Testimony of Earl Paine)

Q. What was that conversation?

A. And the conversation was that Gratz would probably like to hire him if Tam would release him.

Q. Mr. Vessels knew that Mr. Gratz would like to have Mr. McDonald if Tam would release him?

A. That is my understanding.

Q. But you had no conversation with Mr. Gratz himself? A. No. [233]

Q. Did you have any conversation with Mr. Tam in regard to Mr. McDonald? A. No.

Q. Mr. Paine, in using these types of forms, plaintiff's Exhibit 5, and Defendants' Exhibit B, it was customary for you to use these forms in all terminations which occurred on Bahrein Island?

A. Just this form here.

Q. You are pointing to the Air Transport Command form? A. That is right.

Q. Which requested transportation from Captain Judy, asking him to furnish transportation from Bahrein Island to Cairo by air? A. That is right.

Q. Now, with reference to Defendants' Exhibit B, your statement is that there were various types of forms used? A. That is right.

Q. Now, under what circumstances was the form used which compares to Exhibit B?

A. We had a form similar to this with the exception that in this case, as stated here—"Resignation," the other was in case of termination by the company or a medical termination.

Q. In case of termination by the company you are [234] referring to termination for cause, are you not?

A. That is right, and also medical.

(Testimony of Earl Paine)

Q. In case of termination for cause or in case of a medical termination then you would set out the reasons underneath the request, would you?

A. That is right.

Q. As a matter of practice? A. Yes.

Q. But in the form of Defendants' Exhibit B you state that—"There is a reference to your resignation from the service of the company, effective" such and such a date and there is no reason for the resignation set out, is there?

A. Not on this form. There was a separate letter for that.

Q. Now, did Mr. McDonald request you to use either the resignation form or the cause form? A. No.

Q. As he stated, it was immaterial to him which form was used, is that true?

A. Yes, I believe that is correct.

Q. Mr. Paine, were you instructed at any time by Mr. McAuliffe to see that Mr. McDonald returned to the job?

A. Why, that was my original reason for going to see Mr. McDonald. I was called by Mr. McAuliffe to find out why he wasn't reporting for work. [235]

Q. But had Mr. McAuliffe authorized you to state to Mr. McDonald "Go back to work"?

A. Well, that was customary. That was within my—one of my duties was to get the men back on the job if it was possible.

Q. In performing this particular duty of getting McDonald back to work was it your function to see that he

(Testimony of Earl Paine)

went back to work for Mr. Tam or did you have any other instructions?

A. No. He was just to report to the job. Whoever his superintendent was it was normal for him to have reported to him. That would be normal procedure, but I probably would not have mentioned any names except to tell him to go back to work.

Q. At the time that you were told to see that Mr. McDonald went back to work did you have any knowledge of an altercation between Mr. Tam and Mr. McDonald?

A. Yes. Mr. McAuliffe mentioned there was some trouble between them when he called me and naturally as long as that was trouble on the job I could not become involved in it other than to try to get him back to the job and get it straightened out.

Q. But your authority was to ask McDonald to go back to work for Tam alone?

A. To report back to the job. [236]

Q. But Mr. McAuliffe had not given you any authorization to send him to another job or transfer him to any other job than the one he was on?

A. That wasn't customary at all.

Mr. Sheridan: No further questions.

Mr. Chance: Nothing further. May this witness be excused, your Honor?

The Court: Yes.

Mr. Chance: Your Honor, we would next desire to put into the record the stipulation for the taking of the deposition of Edward Gratz on written interrogatories, signed by counsel for plaintiff and defendants and the direct interrogatories to be administered to the witness together with the cross interrogatories and the answers thereto, taken in Pittsburgh, Pennsylvania, and I would like to read them into the record. Perhaps your Honor would desire to follow the original. I will read the copy. I have furnished counsel with a copy and will read from the copy. Perhaps if Mr. Deegan would go up on the witness stand and read the answers it would expedite the matter in that way.

The Court: Yes.

Mr. Chance: I will ask the questions of Mr. Deegan and he can give the answers as the witness Edward Gratz has given them to the written interrogatories.

(The questions and answers were read as follows:)

[237]

"Q. What is your full name?

"A. Edward August Gratz.

"Q. What is your present address?

"A. 5106 Carnegie Street; that is temporary though; no permanent address.

"Q. What is your business or occupation?

"A. General boilermaker foreman.

"Q. By whom are you now employed?

"A. Unemployed.

"Q. By whom were you employed immediately prior to your present employment?

"A. Not employed now, but last previous employment was with Compania Constructora Bechtel-McCone.

"Q. Were you employed by Compania Constructora Bechtel-McCone, S.A., during the month of July, 1944?

"A. Yes.

"Q. If your answer to interrogatory No. 6 is 'yes' state when that employment started and when it terminated?

"A. Started 10-21-43—terminated 8-7-45.

"Q. If your answer to interrogatory No. 6 is 'yes' state in what capacity you were employed?

"A. General Boilermaker Foreman.

"Q. Do you know Doyle McDonald, the plaintiff in this action? [238]

"A. Yes.

"Q. If your answer to interrogatory No. 9 is 'yes' state when and where you met Doyle McDonald.

"A. Bahrein Island, Persian Gulf, Persia.

"Q. Did you have a conversation with Doyle McDonald during the month of July, 1944, with respect to his work for Compania Constructora Bechtel-McCone, S. A.?

"A. Yes.

"Q. If your answer to the last interrogatory is 'yes' state when and where said conversation took place and who was present at the time?

"A. Place, in front of construction office. Time, July 10, at approximately 9:15 in the morning. Nobody present.

"Q. State what was said by each person, as nearly as you can recall, at the conversation referred to in the last interrogatory, stating what, if anything, Doyle Mc-

Donald said to you and what, if anything, you said to him as nearly as you can recall.

"A. I inquired what he was doing off the job. He said he had terminated his job. That was all that was said at that time.

"Q. In his deposition in this action taken in May, 1945, Doyle McDonald testified as follows: [239]

" 'Mr. Works: Where are we on the calendar? Close to July 10, which was the date of the termination?

" "A. I believe that is July 8, 9 or 10.

" "Q. All right.

" "A. I came back the next morning, and I was standing there and came the superintendent of boilermakers.

" "Q. What was his name?

" "A. I only met him that one time. Gratz.

" "Q. You refer to Ed Gratz.

" "A. That is right. He said, 'I understand you had some trouble over there with Tam.' I said, 'There is nothing in particular wrong about that.' I said, 'A lot of fellows have had trouble with him.' 'Well,' he said, 'did you know I was superintendent here?' I said whether I knew it or not was immaterial to me at the present time. I said I was fired and going home. He said, 'Why did you go to the office. instead of me?' I said, 'I didn't particularly go to the office.' I said, 'I came over here to wait for a ride.' I said, 'Mr. McAuliffe and Mr. Vessels collared me, and they had heard I was going to work overtime and wondered why I wasn't there, and,' I said, 'I told [240] them.' He said, 'You are supposed to report this stuff to me first.' I said, 'Well, forget about it.' I said, 'I am not here to argue. I am waiting for somebody else.' He said, 'Well, you are fired. You are through.

You are finished.' He said, 'That is for sure.' He said, 'I am running the business, and I am going to continue to run it.' ” ”

"Is it true that in the conversation referred to in interrogatory No. 14 you said to McDonald, 'Did you know I was superintendent here?'"

"A. No.

"Q. Is it true that in the conversation referred to in interrogatory No. 14 you said to McDonald, 'Why did you go to the office instead of me?'"

"A. No.

"Q. Is it true that in the conversation referred to in interrogatory No. 14 you said to McDonald, 'You are supposed to report this stuff to me first?'"

"A. No.

"Q. Is it true that in the conversation referred to in interrogatory No. 14 you said to McDonald, 'Well, you are fired. You are through. You are finished. That is for sure.'"

"A. No.

"Q. Is it true that in the conversation referred [241] to in interrogatory No. 14 you said to McDonald, 'I am running the business and I am going to continue to run it.'?"

"A. No.

"Q. Did you have any conversations with Mr. McDonald other than the conversation already mentioned regarding the termination of McDonald's employment with Compania Constructora Bechtel-McCone, S.A.?"

"A. I had a conversation with him at the time he appeared on the job site and I had several conversations between that time and the time referred to in the answer to interrogatory No. 13, but I had no other conversation with him about termination.

"Q. If your answer to interrogatory No. 19 is 'yes' state when and where such conversations took place, the names of all persons present, and state what was said by each of the persons present as nearly as you can recall.

"A. When he came on the job site I asked him where he was from and what his capabilities were. He stated that he was a boilermaker. He didn't state where he was from and no one was present at that time nor at any other time. Our conversations were about his work, just pertaining to his work, telling him what he was supposed to do [242]

"Q. Did you discharge Doyle McDonald from his employment with Compania Constructora Bechtel-McCone, S. A.?

"A. No."

Mr. Chance: Now, Mr. Deegan, if you will turn to Mr. Gratz' answers to cross interrogatories and read them following my reading the question.

(The questions and answers were read as follows:)

"Q. Do you know Doyle McDonald?

"A. Yes.

"Q. Had you met Mr. McDonald on foreign construction jobs other than the one currently being worked at Bahrein Island on July 1944?

"A. No.

"Q. If so, where had you first met him?

"A. See answer to No. 2.

"Q. What was the character of workmanship and craftsmanship displayed by Mr. McDonald while in your employ and under your supervision?

"A. Inferior.

"Q. For what period of time were you in a position to intimately observe the work done by Mr. McDonald?

"A. Approximately four weeks.

"Q. Did you ever personally have occasion to be [243] dissatisfied with the work performed by Mr. McDonald?

"A. No.

"Q. If so, on what occasions? State the names of those present and relate the conversation, if any?

"A. See answer to No. 6.

"Q. Did you ever personally recommend to your superiors that Mr. McDonald be fired from the Bahrein project?

"A. No.

"Q. If so, to whom and on what occasions did you make such recommendation?

"A. See Answer to No. 8.

"Q. What reason, if any, prompted you to make such a recommendation?

"A. See answer to No. 8.

"Q. What action was taken by the supervisory officials on this recommendation?

"A. See answer to No. 8.

"Q. By whom was Mr. McDonald actually fired?

"A. He was not fired.

"Q. Did you possess the power to hire and fire the men under your supervision at Bahrein? Did you exercise this authority over Mr. McDonald?

"A. I did possess the power to fire, not to hire, the men under my supervision at Bahrein, subject to [244] the approval of the general superintendent. I did not exercise this authority over Mr. McDonald.

"Q. To your knowledge did Mr. McDonald have an altercation with Leon Tam on or about the 10th day of July, 1944?

"A. Not to my knowledge.

"Q. Were you personally present at the time of this altercation?

"A. See answer to No. 14.

"Q. Do you have any personal knowledge of what transpired between Mr. Tam and Mr. McDonald?

"A. See answer to No. 14.

"Q. Did Mr. Tam disclose any of the details to you in a conversation which occurred in the presence of Mr. McDonald?

"A. See answer to No. 14.

"Q. Do you have any independent knowledge of what transpired between Mr. McDonald and Mr. Tam other than what you learned through conversation with Leon Tam.

"A. See answer to No. 14.

"Q. If the answer to the preceding interrogatory is 'yes' state the source and state the names of those present when the disclosure was made to you.

"A. See answer to No. 14. [245]

"Q. Did Mr. McDonald state to you that he was willing to work in his craft anywhere on the Island other than under the supervision of Leon Tam?

"A. No.

"Q. Did you offer Mr. McDonald an opportunity to work under your supervision in a job other than the one supervised by Leon Tam?

"A. No.

"Q. Did you offer Mr. McDonald any work at all on the occasion of your conversation of July 10, 1944?

"A. No.

"Q. If you fired Mr. McDonald on the above date, did you do this on your own initiative or were you in-

structed to do so by other officers of the company? By whom?

"A. I did not fire Mr. McDonald, and he was not fired by anybody else, to my knowledge.

"Q. Prior to discharging Mr. McDonald, did you confer with Mr. McAuliffe or Mr. Vessels?

"A. See answer to No. 23.

"Q. Did you have any conversations at all with the above named men relative to discharging Mr. McDonald? With whom did you confer and who was present on that occasion? [246]

"A. No, and I conferred with no one on that subject at any time.

"Q. Did that individual instruct you to fire Mr. McDonald?

"A. See answer to No. 25.

"Q. Did you personally issue a termination slip to Mr. McDonald?

"A. No, but I signed his termination slip and handed it to the clerk in the office.

"Q. How much time elapsed from the time McDonald was discharged until he was transported from Bahrein?

"A. Mr. McDonald was not discharged and I do not know how much time elapsed from the time his job terminated until he was transported from Bahrein.

"Q. How many welders were working with McDonald on the bubble tower on and shortly prior to July 10, 1944?

"A. I do not know.

"Q. Did this number remain constant or did the number in the crew fluctuate?

"A. See previous answer.

"Q. If so, what caused the fluctuation in numbers of workmen? [247]

"A. See answer to No. 29.

"Q. What tools were constantly available at the bubble tower for use in joining the bubble tower sections?

"A. Turnbuckles, jacks, wedges, hammers, et cetera.

"Q. Had you personally instructed McDonald in the methods you wished him to use in joining the tower sections?

"A. No.

"Q. If so, what orders did you give? Did he follow these orders?

"A. See answer to No. 33.

"If not, in what way did he violate your orders?

"A. See answer to No. 33.

"Q. Did you instruct McDonald to use turnbuckles in joining the tower sections? How many turnbuckles were provided for use on the bubble tower site? What size turnbuckles were used?

"A. No. Approximately 8. Four foot and six foot.

"Q. Were steamboat jacks provided for the performance of this job? If so, how many?

"A. No. [248]

"Q. Did you ever personally order McDonald to use steamboat jacks in joining the tower sections?

"A. No.

"Q. How far was the tool storage room from the bubble tower?

"A. Approximately 300 yards.

"Q. How far was the main Awali camp from the bubble tower?

"A. Approximately three miles.

"Q. What means of transportation was used between Awali camp and the bubble tower?

"A. Motor bus.

"Q. Was the providing of tools and equipment for work on the bubble tower your responsibility or was it delegated to Mr. Tam?

"A. Both myself and Mr. Tam.

"Q. If Mr. Tam, by whom had Tam been ordered to perform such duties?

"A. Myself.

"Q. To your knowledge, were tools and equipment constantly available at the bubble tower as required by the workmen?

"A. Yes.

"Q. Under whose supervision were the trucks [249] which hauled material to the bubble tower?

"A. Mine.

"Q. Did McDonald have any authority, to your knowledge, to requisition a truck for the transportation of material?

"A. No.

"Q. By whom was such authority given, if you know?

"A. Myself and Tam subject to my approval.

"Q. If not, who had such authority?

"A. See answers to Nos. 46 and 47.

"Q. If you did not discharge Mr. McDonald, by whom was he discharged, if you know?

"A. To my knowledge he was not discharged, but terminated himself."

Mr. Chance: Your Honor, we have a stipulation with counsel in the same form as the stipulation for the taking of the deposition of Edward Gratz. It is attached to the interrogatories that we have just looked at for the taking of the deposition of Iner Ahrendt, who was the welding inspector, whom it was testified was present at the occasion of the altercation between Mr. McDonald and Mr.

Tam, and we also have a like deposition with respect to the taking of the deposition of Harold Vessels, who was the assistant project manager. [250]

Now, the stipulation, and this of course is subject to your Honor's approval, obviously provides in part that this stipulation shall be without prejudice to the commencement of the trial of the above entitled action on October 1, 1945. It further provides:

"If said deposition is not completed and filed prior to the completion of the trial of said action the court may submit said case pending the filing of said deposition and consider the same when filed, and if upon consideration of said deposition the court so requests a further hearing may be had."

Now, I might explain that this gentleman, Iner Ahrendt, has been a person that we have been trying to locate and run down for weeks and we finally found his whereabouts last Thursday after very diligent search; we thought he was in Milwaukee but we found on inquiry that he had gone to Delaware and his deposition is being taken tomorrow morning. We talked to him on the telephone and he is having his deposition taken in the attorney's office in Wilmington, Delaware, tomorrow morning, which in the normal course should be back here by Friday.

The deposition of Harold Vessels had to be taken in Houston, Texas, and similar circumstances occurred there. We expect that deposition to be back today. It was taken yesterday and mailed out of Houston which should get in here [251] sometime today. So far, however, it has not come in. In view of those circumstances I am going to have to request a continuance of the matter, we will say, until Friday, if convenient to your Honor's calendar, or next week, at which time we would like to put in the

balance of these two depositions. I think they are quite material as there has been a great deal of conflict in the testimony. That is particularly true with Iner Ahrendt because he would be a disinterested witness as he was not employed by the defendants or associated with the plaintiff. If your Honor desires, we could continue the matter and put those in. It might take a half hour to do and then we could orally argue the matter or submit it on briefs that are already on file or follow your Honor's desire in that matter, unless counsel has some other suggestion.

Mr. Sheridan: It would be my wish, if the court please, to orally argue the matter; to let it stand submitted, if that is the court's desire, and let these depositions speak for themselves at the time they are received, because as we have stipulated they may be received by the court and made a part of the record and used and utilized for the purpose of the court coming to its decision.

The Court: I think I would like to have at least 20 or 30 minutes of argument on each side. Of course I do not want to make any disposition of the case until the depositions [252] are in. In any event, when they are received the reporter will make them a part of the record just as though they had been read in open court.

Do you have any rebuttal?

Mr. Sheridan: I think that evidence is material and vital and the court needs it in order to reach a decision.

The Court: You may have some rebuttal, not knowing what the contents of those depositions are going to be, but it should not take very long after they are here. I am just wondering if they will be here by Friday.

Mr. Chance: They should be in the normal course by Friday, but there is a fair likelihood that the one from

Delaware may not get back by that time. I look for it to be in Friday. However, the deposition we took of Gratz in Pittsburgh took longer to come out than we had anticipated. I understand a number of the planes are being grounded right at the moment from the East out here on account of weather conditions, but whatever your Honor desires is perfectly all right with me.

The Court: The state of my calendar is such if I put this over to next week it will conflict with a jury trial that is going to run the entire week. I think I shall continue this then until Monday morning at ten o'clock following anything that might develop on the law and motion calendar and then give you until noon, if that time is needed or required, [253] to complete the argument and complete any oral testimony in the nature of rebuttal.

Mr. Sheridan: If the court please, I am scheduled for a trial in the Superior Court. I know you cannot grant any concessions for State trials, but I am starting Friday morning on a three-day jury trial in the Superior Court and my time will be taken up Friday, Monday and Tuesday. That is the reason I requested this court, if it felt so inclined, to let the oral argument be made now and the matter stand submitted.

The Court: I am afraid the oral argument would not be helpful pending the testimony of the two witnesses and any possible rebuttal.

Mr. Chance: May I make a suggestion that we might fit it in with your Honor's calendar and with Mr. Sheridan's calendar and mine at some later day next week. Possibly your clerk could notify us when you had the time.

The Court: I think I shall just have the clerk make a minute entry that this matter is continued for further

hearing until some day next week, the date to be announced later.

Mr. Chance: Thank you very much, your Honor.

Mr. Sheridan: Thank you.

The Court: And then we will see what the situation is by Monday or Tuesday. [254]

Mr. Chance: That is entirely satisfactory, your Honor.

The Court: Is there anything further in connection with this case at this time?

Mr. Chance: Not at this time from the defendant, your Honor.

Mr. Sheridan: Nothing further, your Honor, at this time.

The Court: Very well, we will suspend until a date to be announced next week.

(Whereupon, at 2:45 o'clock p.m., the above entitled matter was continued without date.) [255]

* * * * *

Los Angeles, California, Tuesday, October 9, 1945
2:00 P. M.

The Clerk: No. 4549, McDonald vs. Bechtel-McCone Corporation, and others, for further trial.

Mr. Chance: Ready.

Mr. Sheridan: Ready, your Honor.

The Court: You may proceed.

Mr. Chance: Your Honor, we have two depositions that we desire, on behalf of the defendants, to introduce into evidence, if your Honor has the originals in the file.

The Court: Yes, I have.

Mr. Chance: Would your Honor desire to read from that, and we will read them into the record. We have a copy here.

The Court: Very well.

Mr. Chance: It will facilitate it, your Honor, if you will follow this.

The Court: Yes. I have read the depositions, but I would be glad to have you read them into the record and further refresh my memory. I read them in the interim.

Mr. Chance: Counsel, I believe, has not had a chance to see these, so we will go ahead. I will read the questions and Mr. Deegan will give the answers of the witness, Harold Vessels, taken pursuant to written stipulation on file in this case.

The questions are these: [258]

"Q. What is your full name?

"A. Harold Frances Vessels.

"Q. What is your present address?

"A. 3608 Carnegie Street, Houston, Texas.

"Q. What is your business or occupation?

"A. Construction superintendent.

"Q. By whom are you now employed?

"A. At present time I am working for myself, doing a little work for myself, while I am waiting for a job to reopen with Bechtel-McCone.

"Q. By whom were you employed immediately prior to your present employment?

"A. Bechtel-McCone-Parsons.

"Q. Were you employed by Compania Constructora Bechtel-McCone, S. A., during the month of July, 1944?

"A. Yes.

"Q. If your answer to interrogatory No. 6 is 'yes' state when that employment started and when it terminated.

"A. It started April 18th, 1944, and I guess it ended on May 18th, 1945.

"Q. If your answer to interrogatory No. 6 is 'yes' state in what capacity you were employed.

"A. In July, 1944, I was acting as Assistant Project Manager on the job, and later my title was [259] changed to Assistant General Superintendent.

"Q. Do you know Doyle McDonald, the plaintiff in this action?

"A. Yes.

"Q. If your answer to interrogatory No. 9 is 'yes' state when and where you met Doyle McDonald.

"A. I first met Doyle McDonald in Cairo, Egypt, in the latter part of May, 1944.

"Q. Did you have a conversation with Doyle McDonald during the month of July, 1944, with respect to the termination of his employment with Compania Constructora Bechtel-McCone, S. A.?

"A. Yes.

"Q. If your answer to the last interrogatory is 'yes' state when and where said conversation took place and who was present at the time.

"A. The first conversation with McDonald took place just outside of the construction office, and later Mr. McAuliffe joined us in this conversation. The second conversation was a very brief conversation the following morning. There was no one present at the second conversation except McDonald and myself. This second conversation took place just outside of the construction office.

"Q. State what was said by each person, as [260] nearly as you can recall, at the conversation referred to

in the last interrogatory, stating what, if anything, Doyle McDonald said to you and what, if anything, you said to him, as nearly as you can recall.

"A. On the evening in question I was coming into the construction office and saw Mr. McDonald. Knowing that he was supposed to be working overtime that evening I was curious to know why he was standing around outside of the office. Upon questioning about this overtime work he told me he had had some trouble with Mr. Tam, and was not going to work over-time that evening, and he was waiting for a ride to go in to Awali, which was the camp. About that time Mr. McAuliffe came out of the office, and I called him over, whereupon Mr. McDonald told him, in substance, what he had discussed with me. As Mr. McAuliffe and I were leaving McDonald was told to come out the next morning, and we would see what could be done about it. The next morning when I came into the construction office McDonald was there, and he told me he had just seen Mr. Gratz, and that he would go back into camp. I told McDonald to go on out to work, and as soon as I had an opportunity we would see what could be [261] done. I don't remember definitely what he answered, but it was in the negative, because shortly afterward he went back to camp."

Mr. Chance: Question No. 14 is a quotation from the McDonald deposition taken on May 19th, this year, in this action, and I will not take the court's time to read that quotation, as we have been over it before, but the question in the interrogatory is as follows:

"Is it true that in the conversation referred to in this interrogatory No. 14 McDonald said, 'Seem as though

I can't work for Tam. Have you got any other job? I'd just as soon work on another job'?

"A. I definitely remember about McDonald stating that he couldn't get along with Tam; other than that I don't remember.

"Q. Is it true that in the conversation referred to in interrogatory No. 14 McAuliffe said, 'Well, we are going to stop this transferring, put a stop to it. We will see. You come back out in the morning, and report to Harold Vessels. You come back and see Mr. Vessels, and he will take care of it.'? If your answer to this interrogatory is in the negative, or if the foregoing is not an accurate statement of the conversation, state as nearly as [262] you can remember the substance of what McAuliffe said at that point in said conversation.

"A. All I can definitely say is that McAuliffe did tell him to come out the next morning; other than that I am unable to state. I don't remember.

"Q. Is it true that in the second conversation following the first conversation referred to in interrogatory No. 14 you said, 'Mac, go on out there and go to work.'?

"A. Yes, that is true.

"Q. Is it true that in the second conversation referred to in interrogatory No. 14 McDonald replied to you, 'Ed Gratz just fired me. On top of Tam, Gratz made it unanimous. I am fired and I am going back to camp.'?

"A. I can't state that. I don't remember definitely what was said.

"Q. If your answer to the foregoing interrogatory is in the negative, or if the statement there related is not accurate according to your recollection, state the substance of McDonald's reply as near as you can remember.

"A. As near as I can remember McDonald told me he had just talked to Mr. Gratz. I don't recall [263]

what he said the conversation was, but I do remember telling him to go on out and go back to work.

"Q. Did you give any instruction to McDonald on the day after his altercation with Tam in July, 1944, with respect to McDonald returning to his work?

"A. None, other than what I have stated."

Mr. Chance: We will skip No. 21, because it has already been answered. No. 22:

"Q. If your answer to interrogatory No. 20 is in the affirmative, state whether or not McDonald complied with your instruction and what McDonald did, and what McDonald said, and what he did in that respect.

"A. McDonald did not go to work; he went back to camp. Definitely as to what he said, I don't recall."

Mr. Chance: Now, that is the conclusion of the Vesels' deposition.

I would like now to read into the record the questions and answers propounded on written stipulation on file in this action to Iner Ahrendt. I will read the questions, with the court's permission, and will ask Mr. Deegan to read the answers given by the witness, Iner Ahrendt: [264]

"Q. What is your full name?

"A. Iner Ahrendt.

"Q. What is your present address?

"A. 11 Avenue E, Claymont, Delaware.

"Q. What is your business or occupation?

"A. Welding Engineer.

"Q. By whom are you now employed?

"A. A. O. Smith Company, Milwaukee, Wisconsin.

"Q. By whom were you employed immediately prior to your present employment?

"A. By the same corporation at Milwaukee, Wisconsin. I have been with the A. O. Smith Company for the past 23 years.

"Q. Were you employed by the Bahrein Petroleum Company, Limited, a corporation, during the month of July, 1944?

"A. During the month of July, 1944, I was employed by A. O. Smith Company which had a contract with the Bahrein Petroleum Company, Limited, to supervise the welding of pressure vessels.

"Q. If your answer to interrogatory No. 6 is 'yes' state when that employment started and when it terminated.

"A. My association with the job of A. O. Smith Company for the Bahrein Petroleum Company, [265] Limited, began about March 1, 1944, and ended March 8, 1945.

"Q. If your answer to interrogatory No. 6 is 'yes' state in what capacity you were employed.

"A. My employment on the job was in the capacity of welding engineer.

"Q. Do you know Doyle McDonald, the plaintiff in this action?

"A. Yes.

"Q. If your answer to interrogatory No. 9 is 'yes' state when and where you met Doyle McDonald.

"A. I met Doyle McDonald on the job. That was the first time I had ever met him.

"Q. Do you know Leon Tam?

"A. Yes.

"Q. If your answer to interrogatory No. 11 is 'yes' state when and where you met Leon Tam.

"A. I also met Tam for the first time on the job. I did not know him before that time.

"Q. Were you present at a conversation between Doyle McDonald and Leon Tam during the month of July, 1944, when a certain instruction was issued by Tam

to McDonald in the course of assembling a bubble tower on Bahrein Island?

"A. I was not present at the time, but learned [266] about it later and I was present when there was some discussion or argument between Tam and McDonald. I did not remain throughout the whole of the argument. There was a place boarded off and designated as a place where men could sit down and smoke, smoking being prohibited at other places, and while the argument was in progress I went to this boarded off place and took a smoke.

"Q. If your answer to the last interrogatory is 'yes' state when and where said conversation took place and who was present at the time?

"A. During the time when I was present while the argument was going on, I do not recall that anyone was present other than Tam and McDonald, except that there were some coolies around there. I have no memoranda to place the exact time when this argument took place. July, 1944, sounds about right, but I have no way of fixing the date in that month.

"Q. State what was said and done by each person, as nearly as you can recall, in the conversation referred to in interrogatory No. 13, stating what, if anything, Doyle McDonald said to Leon Tam, and what, if anything, Leon Tam said to Doyle McDonald, and the full conversation, as [267] clearly as you can recall.

"A. As near as I can remember about that McDonald, I believe, did mention to me that Tam had told him to get these two turnbuckles from another job and he refused to do it, and then in the meantime Tam came around and evidently said something about whether he had gotten these turnbuckles. No doubt Tam gave him orders to get them and that was when this argument started and that

was when I left, because I didn't want any part of the argument, and in fact my orders were to stay clear of those things and I went over and took a smoke and I was quite a way from them and so exactly what was said I did not hear. As soon as Tam came over there and started to talk with McDonald, I walked away. I don't remember a word that was said during that altercation. However, the next day I didn't see McDonald on the job. I don't know whether he was fired or quit, I don't know. I didn't pay any attention to it at the time."

Mr. Sheridan: Your Honor, I request that that last answer, the first part of the answer, be stricken, in which he said, "I believe" and "evidently," and so forth, because it is all pure supposition of the witness. [268]

The Court: That is true, but there will be no harm done, because much of that is already in the record. The court appreciates the fact that that is incompetent evidence and is an expression of opinion.

Mr. Chance, (Continuing reading):

"Q. Was any instruction given by Leon Tam to Doyle McDonald in the course of the conversation referred to in the last interrogatory?

"A. I was not present when Tam gave the instructions to McDonald to get the turnbuckles, but I know about that from what McDonald said to me. He told me that he had been ordered to get the turnbuckles but had refused because they were too heavy. Tam also told me that he had ordered McDonald to get the turnbuckles and that McDonald had refused.

"Q. If your answer to the last interrogatory is 'yes' state what the instruction was that Tam issued to McDonald in the course of said conversation.

"A. My answer to this question is covered by my answer to the last question.

"Q. How long have you been engaged in and about the construction or inspection of oil refineries?

"A. For the last twenty years.

"Q. Have you an opinion as to whether or not the [269] instruction issued by Tam to McDonald, referred to in interrogatory No. 17, was a reasonable instruction?

"A. Yes.

"Q. If your answer to the last interrogatory is 'yes' state what your opinion is as to the reasonableness of said instruction.

"A. Those turnbuckles were not over a block and a half away from the site where this bubble tower was being assembled and I realize that they were heavy but they were not too heavy for two men to carry and if McDonald was not able to carry them alone he did have coolies to send to carry them for him. Therefore, I can see no reason why they weren't gotten.

"Q. State if you know whether or not it is customary and usual practice in oil refinery construction work to employ turnbuckles in the assembly of bubble tower sections approximately 12 feet in diameter and approximately 15 feet in length, each section weighing approximately 20 tons.

"A. Yes. They are used in assembling heavy vessel sections.

"Q. State whether or not to your knowledge turnbuckles were customarily employed in the assembly [270] of such bubble tower and other tower and vessel sections in Bahrein Island in the year 1944.

"A. Yes."

Mr. Chance: Now, Question No. 23 is a quotation from the McDonald deposition taken in May of this year

in this action, which I will not quote here, but the interrogatory No. 23 is as follows, following the quotation:

"Is it true that in the conversation referred to in this interrogatory No. 23 Tam said to McDonald, 'Where in the hell are your turnbuckles?'

"A. I don't recall hearing that. I do know that they had hydraulic jacks on the job and the turnbuckles that were used on there with the hydraulic jacks done the job, so both of them were necessary. All the time that I was present on the job while there was any welding it was done by welders. However, in the course of assembling if a welder did not happen to be present the boilermakers did do some tack welding.

"Q. Is it true that in the course of the conversation referred to in interrogatory No. 23 McDonald said to Tam, 'I told you the other day to give me a truck and I would gather those up, and you put it off.'?"

"A. That I don't remember. I don't remember [271] hearing that.

"Q. Is it true that in the conversation referred to in interrogatory No. 23 Tam said to McDonald, 'I want turnbuckles on there, and I want them on right now.'?"

"A. That is a part of the conversation between Tam and McDonald that I don't know about.

"Q. Is it true that in the course of the conversation referred to in interrogatory No. 23 McDonald said to Tam, 'You had better grow them. Then we can put them on.'?"

"A. I don't recall that at all.

"Q. Is it true that in the conversation referred to in interrogatory No. 23 Tam said to McDonald, 'You are through, get off the job.'?"

"A. That I didn't hear. I don't know to this day whether that man was fired or quit. I heard no one say he was fired. I heard no one say anything about it.

"Q. If your answer to all or any of interrogatories Nos. 23, 24, 25, 26 and 27 is in the negative or is to the effect that the statements referred to were not as you recall them having been made in said conversation, then please state what was said in each particular respect by Tam and McDonald, [272] respectively, as near as you can recall.

"A. I have already stated practically all I can remember that took place while I was at the spot where the argument between Tam and McDonald was going on. On account of the argument I walked away as I have explained.

"Q. Have you ever been employed by Bechtel-McCone Corporation or by Compania Constructora Bechtel-McCone, S.A.?"

"A. No.

"Q. Were there any Arab workers with McDonald or at the site of the bubble tower on the afternoon of July 9th or 10th when the altercation between McDonald and Tam occurred?"

"A. There were always Arab coolies on the job and there were some of these Arab coolies there at the time of the argument. They must have been.

"Q. If your answer to the last interrogatory is 'yes' kindly state approximately how many Arab workers were present on the site in the afternoon of that day.

"A. I did not count them but I would say at least six.

"Q. After McDonald and Tam had the altercation on July 9th or 10th testified to in your preceding [273] answers, did McDonald come over to you and did you say to him at that time in substance that, 'What's the matter with that fellow Tam? Why doesn't he let the workmen alone?'

"A. No. I made no such remark.

"Q. Did you have a conversation with McDonald on the afternoon immediately following the altercation with Tam referred to in your preceding answers?

"A. No.

"Q. If your answer to the last interrogatory is 'yes' state what, as best you recall, you said to McDonald and what he said to you on that occasion.

"A. I recall no conversation with McDonald after the argument.

"Q. Was it, according to your observation of the construction work on Bahrein Island during the year 1944, usual and common practice for boilermakers to use turnbuckles along with other equipment in the assembly of sections of the kind being assembled on the bubble tower at which the altercation referred to above took place?

"A. Yes.

"Q. Did you observe what, if anything, Tam [274] did immediately following the altercation with McDonald with respect to obtaining turnbuckles for completing the bubble tower section assembly on the same afternoon?

"A. Yes.

"Q. If your answer to the last interrogatory is 'yes' kindly state what you observed Tam did immediately

following the altercation with McDonald with respect to obtaining turnbuckles.

"A. Immediately after that Tam walked up to this other job and got the turnbuckles and brought them back. He took some coolies along with him, I believe."

Mr. Chance: That completes the Ahrendt deposition, if your Honor please.

Then we have one short stipulation that I would like to propose to counsel. We have discussed it heretofore. The defendants offer to stipulate, but without waiving the legal point that the defendants will make in the argument, namely, that the proper measure of damages, as we view the case, does not involve or does not include the item of subsequent earnings of the plaintiff, even if your Honor were to determine the issues otherwise adversely to the defendants—subject to that point that we do not waive the proposition of law, but to make the record complete we offer to [275] stipulate that the plaintiff's earnings in other occupations subsequent to April 30, 1945, and we have already put into the record on a stipulation his earnings down to May 1st of this year, were as follows:

In the month of May, 1945, \$244.10 was earned by plaintiff in other occupations; in June, 1945, \$338.20; in July, 1945, \$481.50; in August, 1945, \$351.35; in September, 1945, \$346.29, amounting in total from May 1, 1945, to September 30, 1945, to a total of \$1,761.44.

Is that stipulated to, counsel?

Mr. Sheridan: That is so stipulated. Your Honor, if the court pleases, I can introduce the checks of the plaintiff also.

Mr. Chance: I don't think it is necessary.

The Court: I don't think it is necessary, in view of your stipulation.

Mr. Sheridan: Very well. The plaintiff will need them for his income tax purposes if the court does not desire them.

Mr. Chance: The defendants have no further testimony, your Honor.

The Court: Do you have any rebuttal, Mr. Sheridan?

Mr. Sheridan: No rebuttal, your Honor.

The Court: Then I will hear you on your argument, and in order that we might possibly shorten the argument and [276] have you come to the points the court has in mind, I will state that it is not necessary that any argument be made at all on the question as to whether the use of turn-buckles or some other device was the highest or the best or the most essential use to be engaged in in getting this work done, because the court takes the position that it was the plaintiff's duty, irrespective of what Mr. Tam, his immediate foreman, knew about the work, or how competent or incompetent he was, when he was given an order it was his duty to carry it out, whether it was wise or unwise.

Now, will you let me have the file, and particularly the exhibits?

(The documents referred to were handed to the court.)

(Argument on behalf of plaintiff by Mr. Sheridan.)

(Argument on behalf of defendants by Mr. Chance.)

(Closing argument on behalf of plaintiff by Mr. Sheridan.) [277]

The Court: I am not going to attempt to detail the evidence, as I see it, nor to summarize it at length, except as I shall make some reference to it in making a disposition of this controversy.

The first matter that we must give consideration to, naturally, is this written contract of employment. Ordinarily we do not have in a situation of this kind, if it were domestic rather than foreign service, a written contract of employment. I daresay that almost 99 per cent of employment contracts between an individual and a construction corporation are on an oral basis. But here the employer was taking the employee many thousands of miles from his home in a period of war, when travel was much restricted, and when it was extremely expensive, and when only such movements and such activities as are indicated by this contract were engaged in by reason of the part which they played in the war effort itself. This contract of employment undoubtedly was one that was drawn by the employer, and then signed by it and the employee here. Being drawn by the employer, of course, it cannot be interpreted favorable to the employer, in any interpretation of it and its terms. The three paragraphs that bear directly upon the issues here are the covenants contained in paragraphs 6, 9 and 10. 6 recites the obligations that the employee assumes, and 9 has a special provision for the termination of the contract by [278] either of the parties, and 10 provides for a termination of the contract and liabilities thereunder by the employer, if they should elect to do so and if they have a sufficient cause for doing so.

It is the contention of the plaintiff that without cause he was discharged and the contract was breached, and that the liability arises for the loss that he sustained during the remaining period of this contract, which was an 18 months contract, as I recall it. Performance had proceeded for about a month, or a little longer period of time, under the contract.

The defendant contends that the plaintiff summarily ceased to perform under the terms of the contract, and, therefore, is not entitled to any recovery.

In attempting to arrive at what the actual facts were in this case, I cannot, of course, adopt the testimony of either the plaintiff or the defendant to the exclusion of the other, because there is nothing in this situation that would indicate to the court that all truth lies on one side and all error on the other. I must attempt, insofar as it is humanly possible to do so, to visualize the situation as it must have occurred 10,000 miles away out there in the Mediterranean Ocean, on some little island, where a terrific and hurried effort was made to bring into future utilization that great essential in carrying on the war, additional [279] petroleum supplies.

It is totally beside the question here as to whether Mr. McDonald, the plaintiff in this case, or Mr. Tam, his immediate foreman were the better qualified to judge as to the means and methods and procedures in construction, and I am not going to attempt to determine that, other than to say in passing that Tam must have possessed some of the essential qualifications for this rather complex construction, as well as did the plaintiff, Mr. McDonald.

It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles. He made no real effort to do that, and he didn't intend to do it, and, certainly, if this were not at a place far distant from this country and under the situations that here prevailed, he committed an act that would have been the basis of a summary cancellation of the contract and all liabilities by the employer.

I must find that the order to proceed with construction, as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination. And I do find that Tam after this altercation,—that the altercation was not a mere passing difference, it [280] was one that at the moment threatened great physical violence to one or both of these parties, and but for the good judgment somewhat on both sides it didn't break out into an actual physical encounter, but it resulted in a situation, under working conditions such as must have prevailed here, where these two men simply could not live side by side even through working hours thereafter. Tam undoubtedly stated that McDonald was discharged, but he did not have the authority to discharge him and abrogate McDonald's rights under this contract, because he himself occupied a subordinate position.

It appears from the evidence in this case, so far as the workmen were concerned, if there was any authority to discharge, it was with this man Gratz, although he was, in the final analysis, only an employee of the defendant company. But he was the superior of Tam. Certainly, under the procedure there prevailing, when he said a man was discharged, and there is something in the evidence that supports this conclusion of the court, that would be a discharge except that there be intervention by someone still higher, and the next in authority was a direct representative of the employer, the parties obligated under this contract, and that was Mr. Vessels, and his superior, Mr. McAuliffe, who was the man finally in authority and who made determinations.

I must find that on the evening of July 9th, following [281] the altercation between the plaintiff and Tam, the matter came to the attention of Vessels, and Vessels' superior, Mr. McAuliffe, and they did not elect to find that there was insubordination. They might have done so, and then this court would be confronted with an entirely different problem. But they elected, on the contrary, to overlook what had occurred, and directed the plaintiff to report back for work the next day. He did report back, and then, whether it was before or after his further contact with Vessels and McAuliffe, he contacted Gratz, who was the superior of Tam, and who evidently was the man on this particular job that had some real authority. Gratz advised the plaintiff, and the court has no hesitancy in finding it was not in any friendly tone, that the plaintiff should have brought his troubles to his superior in the boilermakers' organization, that is, Mr. Gratz, and not have gone to the employer, Vessels and McAuliffe. He was angry about that, and then he affirmed what his subordinate, Mr. Tam, had said and done, and said, "You are discharged."

Now, still the parties primarily liable under this contract, through their representatives, didn't accept the action of either Tam or Gratz, except to this extent: when the plaintiff reported to them, and plaintiff was then perfectly willing to continue to perform under the contract, but that willingness was conditioned upon the fact that he [282] would not be directly under the supervision of Foreman Tam, he was advised to go back to work, but

under the immediate and direct supervision of the man that the court must find, from the situation as it is disclosed by the evidence here, created an impossible condition and he could not have worked there and would not have been able to continue long because of the tremendous bitterness that had been engendered because of the encounter of the day before. There is no necessity for me to determine who was the man to blame. So this order of Mr. Vessels and Mr. McAuliffe created a situation that made it impossible for the plaintiff to further perform, and could result in only one thing, and that is a termination of the contract.

Now, the court having found that the defendant—I might have misspoken myself before and said the plaintiff—the defendant by a course of conduct terminated this contract, would it follow, as a matter of law, that the liability would be for the life of the contract or would that termination be in accordance with the rights of the defendant under the contract itself? Certainly, if the defendant had written out formally a notice to this plaintiff that: you will remain on the pay roll for 30 days, and thereafter your services will be terminated, and under the contract it was not required to give any reason whatever, it could not have been more effective than what did occur. I am forced to the [283] conclusion that, as a matter of law, the plaintiff could not and cannot recover herein more than the one month's wages and his transportation back home. The termination is one that was not formal, yet was within the rights of the defendant to make, and the defendant could make it in the manner in which it

did, by logical inference to be drawn from undisputed facts, rather than by the formal procedure as provided by the contract itself, that is, a written notice.

For the reasons stated, I shall find that the plaintiff is entitled to recover herein the sum of such an amount as is measured by one month's compensation, plus his transportation back home, less any advances, if there are any. I do not know how those figures finally work themselves out. Findings of fact and conclusions of law and a decree may be submitted next Monday, if possible. That is our law day.

Mr. Chance: Thank you, your Honor.

The Court: Now, if there is any other feature in connection with this case that I haven't made clear in my offhand memorandum judgment or decision, in disposing of it, I would like counsel to state it now, because I trust that you can get together and work out the findings of fact and conclusions of law without bringing the matter back again for further argument.

Mr. Chance: Will counsel prepare and submit the findings to us under the rules, and we will shorten the time [284] so that they can be presented to your Honor?

Mr. Sheridan: Yes. I will prepare a set and submit them to Mr. Chance.

Mr. Chance: I think we understand your Honor's direction.

The Court: Very well. [285]

CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of November, A. D., 1945.

JACK D. AMBROSE

Official Reporter

[Endorsed]: Filed Nov. 23, 1945.

[Endorsed]: No. 11222. United States Circuit Court of Appeals for the Ninth Circuit. Compania Constructora Bechtel-McCone, S. A., a corporation, Appellant, vs. Doyle McDonald, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed December 31, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11222

COMPANIA CONSTRUCTORA BECHTEL-Mc-
CONE, S. A.,

Appellant,

vs.

DOYLE McDONALD,

Respondent.

STATEMENT OF POINTS ON WHICH APPEL-
LANT INTENDS TO RELY ON APPEAL AND
DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR THE CONSIDERATION
THEREOF.

The following is a statement of the points upon which appellant, Compania Constructora Bechtel-McCone, S. A., intends to rely on its appeal from the judgment heretofore entered in this action:

1. The uncontradicted evidence establishes that respondent voluntarily abandoned his rights under the employment contract sued upon by refusing to report for work as instructed by appellant, and the court's finding to the contrary is wholly without support in the record.

2. The uncontradicted evidence establishes that appellant's course of conduct in refusing to transfer respondent to another job and instructing him to return to work under the supervision of foreman Tam was consistent with appellant's rights under the employment contract and did not amount to a wrong-

ful discharge, and the court's finding to the contrary is wholly without support in the record.

3. The court's finding that foreman Tam created a condition rendering it impossible for respondent to further perform under Tam's supervision is wholly without support in the record and is inconsistent with the court's prior findings that respondent made no real effort to obey and did not intend to obey Tam's instructions, and that such disobedience was equivalent to insubordination.

4. The court's finding that appellant made it impossible for respondent to further perform the employment contract is wholly without support in the record.

5. Assuming but not conceding that respondent was discharged, his refusal to obey the instructions of his superiors constituted sufficient cause for such discharge as shown by the uncontradicted evidence, and the court's finding to the contrary is wholly without support in the record.

6. The court's finding that on July 9, 1944, respondent wrongfully refused to comply with the reasonable instructions of foreman Tam with reference to obtaining and using the turnbuckles, together with respondent's own testimony that Tam told him he was fired and that general boilermaker foreman Gratz told him he was fired, together with the instruction of the project manager that respondent was to report back to work under Tam and respondent's re-

fusal to comply with the latter instruction, as a matter of law constituted a termination of the employment contract by respondent, thereby precluding respondent from any recovery whatever.

Appellant hereby designates the following as the portions of the record necessary for consideration of the points on which it intends to rely on its appeal herein:

* * * * *

Dated, December 29, 1945.

O'MELVENY & MYERS
JACKSON W. CHANCE and
LEO A. DEEGAN

By Leo A. Deegan

Attorneys for Appellant, Compania Constructora
Bechtel-McCone, S. A.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 4, 1946. Paul P. O'Brien,
Clerk.

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No. 11222

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a
corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

APPELLANT'S OPENING BRIEF.

Pleadings and Facts Disclosing Basis of Jurisdiction.

This action was instituted in the Superior Court of the State of California in and for the County of Los Angeles and thereafter, pursuant to order of said court [Tr. pp. 23-24] the cause was removed to the District Court of the United States, for the Southern District of California, Central Division. Doyle McDonald, plaintiff in the court below, is a citizen and resident of the State of California. [Tr. p. 16.] Bechtel-McCone Corporation (sued under its former corporate name, Bechtel-McCone-Parsons Corporation) one of the defendants in the court below, is a corporation organized and existing under the laws of the State of Nevada and is a citizen and resident of that State. [Tr. p. 16.] Compania Constructora Bechtel-Mc-

Cone, S. A. (sued under its former corporate name, Compania Constructora Bechtel-McCone-Parsons, S. A.) the other defendant in the court below and appellant herein is a corporation organized and existing under the laws of the Republic of Venezuela and is a citizen and resident of that Republic. [Tr. p. 17.] Doe One Company, a corporation, Doe Two Company, a co-partnership, Doe Three, Doe Four and Doe Five, joined in the complaint as alleged defendants, are purely fictitious parties having no real existence and it affirmatively appears from the face of the complaint and the exhibits attached thereto [Tr. pp. 2-14] that no cause of action was stated against said fictitious parties, that there are no persons other than Bechtel-McCone Corporation and Compania Constructora Bechtel-McCone, S. A. necessary or proper to be joined as defendants and that there are no persons other than plaintiff and said defendants having any relationship to or interest in the purported cause of action sued upon.

In his complaint plaintiff sought to recover \$4,015 as damages for the alleged failure and refusal of defendants to perform the terms of a written contract of employment. The matter in controversy, therefore, exceeded the sum of \$3,000, exclusive of interest and costs, with the requisite diversity of citizenship. [Tr. pp. 16-21.] The statutory basis for jurisdiction of the District Court is 28 United States Code, Sec. 41 (1), and the removal thereto was based upon 28 United States Code, Secs. 71 and 72.

Answer having been filed by the defendants in the District Court, trial was had upon all issues in the case. Thereafter the District Court entered its judgment [Tr. pp. 31-32] in favor of plaintiff and against defendant

Compania Constructora Bechtel-McCone, S. A. in the amount of \$852.92 together with costs in the amount of \$60.55.

Compania Constructora Bechtel-McCone, S. A. has appealed [Tr. p. 33] from the judgment. The statutory basis for the jurisdiction of this Court is 28 United States Code, Section 225 (a).

Statement of the Case.

During the year 1944 appellant was engaged in the construction of high-octane gasoline refinery facilities on Bahrein Island in the Persian Gulf for The Bahrein Petroleum Company, Limited. On May 28, 1944 appellant and appellee entered into a written employment agreement [Tr. pp. 43-49] whereby the former employed the latter as a boilermaker (or in such other capacity as appellant might from time to time require) in said construction work for a term of 18 months. The contract was subject to cancellation by either party upon giving the other one month's notice. [Tr. pp. 45-46.] The agreed salary was \$450.00 per month.

J. Roy McAuliffe, as Project Manager, was in complete charge of the construction work on Bahrein Island for appellant. Directly under him were Harold Vessels, assistant project manager, and two general superintendents. Directly under the general superintendents were the various general foremen in charge of their respective crafts and among these Ed Gratz was the general boilermaker foreman. Under Gratz were three or four boilermaker foremen, including Leon Tam. Tam had a number of boilermakers working under his supervision numbering from 30 to 40 men, including Doyle McDonald, appellee

herein. Each boilermaker had a crew of Arab laborers assigned to him who did the manual work of handling materials and carrying tools for the boilermakers. The boilermaker foremen, including Tam, had no authority with respect to discharging boilermakers working under them, their sole authority in that regard being to take a man off the job and send him to the general boilermaker foreman with recommendations. The general boilermaker foreman had authority to discharge subject in all cases to the written approval of the Project Manager. [Tr. pp. 186-189.]

Appellee performed services pursuant to the employment agreement from on or about May 29, 1944, to on or about July 9, 1944. For approximately the first two weeks of that period he worked on the assembly of a bubble tower then in the course of construction as a part of the refinery facilities. For approximately the next two weeks he worked at setting the base of a smokestack located some distance away from the site of the bubble tower. He then returned to the bubble tower and continued working there until the afternoon of July 9, 1944, when he had an altercation with Leon Tam, his immediate foreman, which eventually led to this litigation. [Tr. pp. 54-63.]

The bubble tower assembly job referred to herein consisted of bringing together, fitting and permanently securing together, in a horizontal position on the ground, the several pre-fabricated cylindrical sections of the shell of the vessel. The sections were 12 feet in diameter, ranged in height from 16 to 20 feet and weighed approximately

20 tons each. In the course of assembly of the shell of the vessel a cradle was built in a line pointing directly to the foundation upon which the vessel would eventually be set. The base section would then be lifted into the cradle with a crane and set at the end of the cradle closest to the foundation. Then the next section would be lifted into the cradle into approximate juxtaposition with the base section and with the assistance of additional tools, discussed more particularly hereinafter, it would then be moved to within one-sixteenth of an inch from the base section and into exact alignment with it. The nearly adjoining ends of the sections would then be shaped as necessary to place them in exactly true position for joiner by welding. This process would be repeated with the remaining sections until the entire shell of the vessel was completely assembled and welded together in a horizontal position on the cradle. The duty of the boilermaker in this process was to cause the sections to be brought into exact alignment and to fit up the adjoining ends of the sections so that they were in correct position to be welded together. [Tr. pp. 189-191.]

Several different types of tools were used on this job to bring the ends of the tower sections into close enough proximity to each other to be welded together. The crane, jacks, keyplates, wedges, and turnbuckles were used in this process. [Tr. pp. 121-124, 190, 259, 75-80.] Appellee had refused to obey his foreman, Tam's, order to obtain and use turnbuckles in bringing the sections of this bubble tower into place, as appellee claimed that turn-

buckles were not efficient tools to accomplish this work. This refusal led to the altercation which resulted in plaintiff's termination. [Tr. pp. 80-81.] However, in view of the trial court's findings of fact and conclusions of law,* the effectiveness of using turnbuckles, as well as the other mentioned tools, for joining the tower sections, is immaterial. This results from the trial court's findings and conclusions that regardless of appellee's inclination not to use turnbuckles, and regardless of whether his foreman, Tam's, instruction to use turnbuckles was the most efficient manner of construction, nevertheless, it was appellee's duty to obey the order to get the turnbuckles and use them, the words of this finding being:

"It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles. He made no real effort to do that, and he didn't intend to do it. . . . I must find that the order to proceed with construction as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination." [Tr. pp. 266-267.]

*By written stipulation of counsel [Tr. p. 30], the decision of the Court announced from the bench on Tuesday, October 9, 1945, as taken down and transcribed by the stenographic reporter, is deemed to be and constitute the findings of fact and conclusions of law in this action without necessity for a separate statement thereof and without necessity for the Court's signing the same. Thus, the reporter's transcript of the Court's oral decision [Tr. pp. 264-270] constitutes the findings of fact and conclusions of law of the trial court in this action.

While, as shown above, the question of fact as to whether turnbuckles were the most efficient tool to use on this particular construction job is entirely immaterial, nevertheless, the facts involved in plaintiff's refusal to use the turnbuckles on July 9th, which led up to the altercation resulting in this litigation, have a bearing upon the points presented in this appeal as will hereinafter appear.

Appellee's version of that dispute is substantially as follows: He first testified that a few days before July 9th he suggested to Tam that a truck be obtained to carry the boilermakers' tools and equipment from the site of the smokestack job where he had recently been working to the bubble tower job where he was then assigned. Tam then told appellee to take some of his Arabs over to get the turnbuckles and other equipment and said "you don't need a truck for that." Appellee protested that the equipment was rather heavy to carry that distance and repeated his suggestion that a truck be obtained. Tam replied that a truck was not needed and appellee testified, "therefore, we didn't go get the stuff because it was too heavy. It was out of reason to carry it." [Tr. p. 71.] At this point appellee's counsel "refreshed" appellee's memory by reading to him his testimony given at a prior deposition and asked him whether that testimony was true. The answer, being in the affirmative, appellee's story was thereby changed to the extent that Tam, instead of saying that a truck was not needed, put the matter off by saying: "We will see about that later."

The turnbuckles that appellee was ordered by Tam to obtain and bring to the bubble tower site were then located "a long block and a half away from the bubble tower site," according to appellee's testimony. [Tr. p. 93.] These same turnbuckles had been at the bubble tower site

when appellee first went to work at that location and had been moved to the smokestack site about the time appellee had been assigned to that job in the month of June. [Tr. p. 91.] These turnbuckles weighed between ten and twelve pounds each, with a swivel screw of one inch in diameter, according to appellee's testimony. [Tr. pp. 95-96.] Two turnbuckles were all that appellee was required to obtain and bring to the bubble tower site on this occasion. [Tr. p. 95.] Appellee had a crew of several Arab helpers whose duty, among other things, was to carry tools such as these turnbuckles. [Tr. pp. 90, 96.]

Then on July 9th, Tam sent word to appellee to work an hour overtime on that day to put another section of the bubble tower in place. A crane with the necessary operators and riggers was to be available during that hour, but was to be transferred to another job the following day. Appellee remained on the job during the overtime period but testified that all his Arab assistants left at the regular quitting time. Appellee then, with the assistance of the crane, caused the new section of the bubble tower to be moved up to the already assembled sections and secured it with two key plates for an overnight hanging. All this work, to the extent that it involved boilermaker's duties, was done by appellee alone. He had been swinging a twelve-pound hammer against the key plates and was tired and perspiring freely. His work was completed, thus releasing the crane, and he was about ready to leave. At this point Tam approached and asked: "Where in hell are the turnbuckles?" Appellee said: "Tam, we never could—we never have been able to use turnbuckles on this. It is a hopeless case, hopeless effort. I have got it secured this way. We can finish it in the morning with key plates. It is up as close as we

can get it. We can release the crane. It can go ahead with its other work." Tam said: "I told you to get some turnbuckles." Appellee replied: "That was three or four days ago. I am not exactly a pack horse or a mule. I sent my coolies after them and they couldn't find them. I asked you several days ago to give me a truck so I could go down and haul up the turnbuckles and other equipment which we needed very bad." Appellee's testimony on direct examination continues:

"So, one word led to another and I was rather hot and exhausted under the conditions of the weather and the work I was doing by myself, so he (Tam) said, 'you are fired.' The only thing I knew to do was to hit the fellow offhand and I didn't do that. I intended to, but I didn't do it. So I went over to Mr. Einer, the inspector, and I said, 'Mr. Einer, it has been a pleasure to work for you.' * * * He was a swell fellow and we had gotten along beautifully all through the process of building the bubble tower, which was very intricate and very detailed and there had never been a harsh word between us under any conditions. * * * So he said to me, he said, 'what is the matter with Tam?' * * * 'can't he get away and leave people alone and let them do the work?' * * * 'Doesn't he know when he is well off as a foreman?' I said 'I don't know.' * * * 'You heard the argument.' * * * 'At least you saw part of it.' So I went over to wait for a bus to haul me back to Awali." [Tr. pp. 60-64.]

Appellee testified further on direct examination:

"Q. When Mr. Tam arrived did he inspect the bubble tower section that you had just put up? A. Yes, he looked at it.

* * * * *

Q. By Mr. Sheridan: Did Mr. Tam order you to do anything other than what you had done when he arrived at the scene?

* * * * *

The Witness: He ordered me to go get the turnbuckles. I told him that we had it all set—that it was not necessary, and he said, ‘well where are the turnbuckles?’ And I said, ‘They are down at the smokestack,’ and from then on more or less the argument became heated and he eventually told me I was fired.” [Tr. p. 81.]

Tam’s version of the dispute with appellee was substantially as follows: On the morning of July 9th and again in the afternoon he told appellee to work an hour over-time that day and to get everything ready for assembling the next section. [Tr. pp. 128-129.] The crane was needed on another job in the morning and appellee was instructed to get the new section up close enough so the crane could be released and the end of the section could be “faired up” later. Tam approached the job site during the overtime period and his testimony as to the ensuing events is as follows:

“I come back about 2:30 and the crane had just taken a lift on the tower. Probably it was within an inch or inch and a half of the shell and Mac [appellee] was just standing there. The riggers were standing there and I said, ‘Well, what is the matter here? Let us get going here.’ I said, ‘We have to release this crane in the morning.’ I said, ‘Where are the turnbuckles?’ He [appellee] said, ‘I am no work horse.’ Then he started blowing off.

Q. What else did he say? A. He said, ‘to hell with you.’

Q. What else did he say if you can remember?

A. He said, 'you ought to have a truck to get that stuff.' I said, 'you don't need a truck to get turnbuckles.' I said, 'they are right down there by the stack in a box.'

So he says, 'I am getting tired of taking your sass,' or some such thing, 'I am quitting.'

So I was standing below the staging and I started to walk away and he came out there and gave me a shove and put his dukes up and started cussing. I told him, I said, 'Be careful, McDonald, and use your head.' He did blow off, and I said, 'Now, you are through working for me.' I said, 'You are through now,' so he went off to the office, I guess." [Tr. pp. 132-133.]

Tam further testified positively that appellee's Arab helpers were present on the job during the overtime period [Tr. p. 134] and that after appellee left he took some of these Arab helpers of appellee down to the smokestack, got the turnbuckles, brought them back and fastened them in place on the bubble tower and had the section in place by 3 o'clock. [Tr. pp. 133-139.]

Iner Ahrendt, the inspector, referred to by appellee, testified that he was near by when the argument between appellee and Tam started but that he then walked away, his orders being "to stay clear of those things" and that he "was quite a way from them and so exactly what was said I did not hear." [Tr. pp. 257-258.] Ahrendt denied

making the statements attributed to him by appellee in his testimony [Tr. p. 262] and stated that there was a crew of Arab helpers present during the argument. He said:

“Immediately after that [the argument] Tam walked up to this other job and got the turnbuckles and brought them back. He took some coolies along with him, I believe.” [Tr. p. 263.]

Appellee’s testimony as to the events following his altercation with Tam was substantially as follows:

After the altercation he went to the nearby field construction office to wait for a bus back to camp and while waiting there got into a conversation with Harold Vessels, Assistant Project Manager, and J. Roy McAuliffe, Project Manager. Appellee explained to them that he had just had an altercation with Tam, explaining its details, and he then requested to be transferred to another job. They told him they would investigate the circumstances and requested that appellee report back to them the following day for an answer. [Tr. pp. 168-171.]

Appellee reported back the following day and met the General Boilermaker Foreman, Ed Gratz, who asked appellee why he had gone to the office instead of first reporting the matter to him, Gratz. In response, appellee stated that he had merely gone over to the office to wait for a ride and that McAuliffe and Vessels had inquired what he was doing there and he told them the situation, appellee then stating to Gratz, “Well, forget about it, I am not here to argue. I am waiting for somebody else.” In reply Gratz said, “Well, you are fired. You are through. You are finished.” [Tr. p. 173.]

The Project Manager, McAuliffe, and his assistant, Vessels, did not approve the action of the General Boiler-maker Foreman, Gratz, and did not accede to appellee's request for a transfer to another work assignment, but, on the contrary, ordered him back to work under the supervision of Foreman Tam. Appellee was unwilling to do this, refused to report back to Tam, and, instead, went back to camp at Awali. [Tr. pp. 171-175.] Plaintiff left Bahrein Island shortly thereafter and returned to his home in Long Beach, California.

Under the terms of the contract, appellant withheld a balance of salary then earned by appellee and applied it to the cost which appellant advanced for transporting appellee back to his home. The salary withheld was not sufficient to reimburse appellant for these charges. [Tr. p. 183.]

The present suit was instituted by appellee to recover damages for breach of contract measured by the balance which would have been earned by appellee less remuneration for other services. Appellant resisted the claim for damages and counterclaimed for the balance of the charges for transporting appellee back home.

Trial was had upon all issues in the case before the court without a jury. The court made its findings of fact and conclusions of law* and entered judgment for appellee for the amount of one month's salary plus appellee's transportation expenses to his home. The findings were that

*See footnote, *supra*, p. 6.

appellee had deliberately disobeyed his foreman and was guilty of insubordination; that the project manager and his assistant elected to overlook the insubordination and ordered him to return to work under Foreman Tam; that Tam had created a condition rendering it impossible for appellee to continue work under Tam's supervision; and that by insisting that appellee return to work under Tam, appellant thereby made it impossible for appellee to continue in the employment, and he was thereby discharged without cause. [Tr. pp. 264-270.]

A copy of the trial court's findings of fact and conclusions of law and the stipulation in connection therewith, are attached hereto as an appendix for the convenience of this court.

Specification of Errors Relied Upon by Appellant.

1. The trial court erred in finding that Foreman Tam created a condition rendering it impossible for appellee to perform further under Tam's supervision; said finding is wholly without support in the record and is inconsistent with the trial court's prior finding that appellee made no real effort to obey and did not intend to obey Tam's instructions and that such disobedience was equivalent to insubordination.

2. The uncontradicted evidence establishes that appellant's refusal to transfer appellee to another job and the instruction for him to return to work under the supervision of Foreman Tam was consistent with appellant's rights under the employment contract, did not amount to wrongful discharge, and the trial court's findings and conclusions to the contrary are wholly without support in the record.

3. The court's finding that appellant's conduct made it impossible for appellee to perform further the employment contract is wholly without support in the record.

4. The uncontradicted evidence is that appellee voluntarily abandoned his rights under the contract by refusing to report for work as instructed by appellant and the trial court's findings and conclusions to the contrary are wholly without support in the record.

5. If appellee was discharged by appellant, appellee's refusal to obey the instructions of his superiors constituted sufficient cause for such discharge, and the court's findings and conclusions to the contrary are wholly without support in the record.

ARGUMENT.

I.

The Court's Finding That Foreman Tam Created a Condition Rendering it Impossible for Appellee to Further Perform Under Tam's Supervision Is Wholly Without Support in the Record and Is Inconsistent With the Court's Prior Findings That Appellee Made No Real Effort to Obey and Did Not Intend to Obey Tam's Instructions and That Such Disobedience Was Equivalent to Insubordination.

The trial court found that appellant did not accept the action of either Tam or Gratz in attempting to discharge appellee, but that appellant instructed appellee to return to work under the supervision of Foreman Tam. Continuing, the court found that "he (appellee) was advised to go back to work, but under the immediate and direct supervision of the man that the court must find, from the situation as it is disclosed by the evidence here, created an impossible condition and he could not have worked there and would not have been able to continue long because of the tremendous bitterness that had been engendered because of the encounter of the day before." [Tr. pp. 268-269.]

Appellant respectfully contends that there is absolutely nothing in "the situation as it is disclosed by the evidence here" to support the court's finding that Leon Tam created an impossible condition.

(a) APPELLEE WAS BOUND TO OBEY THE LAWFUL INSTRUCTIONS OF FOREMAN TAM.

By the terms of the employment agreement between appellant and appellee [Tr. pp. 43-49], appellee expressly agreed

“ . . . to serve Company as a Boilermaker (or in such other capacity as Company may from time to time require) in Company's Zone of Operations for a period of eighteen (18) months from the time Employee shall report for duty at Bahrein, . . . ” (Clause 1).

“ . . . to comply with and abide by all general regulations and instructions from time to time issued by Company, or by The Bahrein Petroleum Company Limited, including those governing hours and conditions of work, *and to obey all lawful orders given by the Company, its Manager, or other duly authorized person or persons.*”* (Clause 6.)

Having in mind appellant's organizational structure on this construction job, as set forth in the second paragraph of the “Statement of the Case” hereinabove, it is established without conflict in the evidence that appellee was under a duty to obey his immediate foreman, Leon Tam, in all lawful orders given by Tam on behalf of the Company. Tam's orders for appellee to obtain turnbuckles and use them on the bubble tower work on July 9th, and also several days prior to that date, was a perfectly reasonable and lawful order. This matter is

*Italics added here and elsewhere in this brief unless otherwise stated.

put at rest by the trial court's express finding on the precise point, as follows:

"... it was still his duty, I find, to obey the order in reference to getting these turnbuckles." [Tr. p. 266.]

(b) APPELLEE DELIBERATELY REFUSED TO OBEY TAM'S
LAWFUL AND REASONABLE INSTRUCTIONS.

Appellee deliberately and wilfully refused to obey Tam's instructions, given on at least two occasions on and shortly before July 9th, to obtain and use turnbuckles in assembling the sections of the bubble tower that appellee was working on, as shown both by the testimony of appellee himself and also by Tam's testimony. [Tr. pp. 71, 81, 128-129, 132.] This matter is likewise set at rest by the trial court's specific finding to this effect, as follows:

"I must find that the order to proceed with construction, as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination."

and further

"He [appellee] made no real effort to do that [obtain the turnbuckles], and he didn't intend to do it, . . ." [Tr. pp. 266-267.]

(c) THE DISOBEDIENCE OF APPELLEE TO TAM'S IN-
STRUCTION WAS THE IMMEDIATE CAUSE OF HIS
ALTERCATION WITH TAM.

It is manifest from the record that appellee's disobedience of Tam's orders was the immediate and proximate cause of the altercation between appellee and Tam on the afternoon of July 9th. This is established by appellee's

own testimony of the exact sequence of events at approximately 2:30 P.M. on July 9th [Tr. p. 62] and also by the testimony of Leon Tam. [Tr. pp. 132-133.] Appellee's own version of these events is that when Tam arrived at the bubble tower site at approximately 2:30 P.M. only July 9th, he said to appellee, "I told you to get some turnbuckles," and appellee replied, among other things, "I am not exactly a pack horse or a mule" and "So, one word led to another and I was rather hot and exhausted under the conditions of the weather and the work I was doing by myself, so he said, 'You are fired.' The only thing I knew to do was to hit the fellow off-hand and I didn't do that. I intended to, but I didn't do it." [Tr. pp. 62-63.] No one can dispute the fact that had appellee not refused to obey the instruction to obtain the turnbuckles, the altercation would not have resulted.

(d) ASSUMING BUT NOT CONCEDING THAT AN IMPOSSIBLE CONDITION RESULTED FROM THE ALTERCATION SUCH CONDITION WAS CREATED BY APPELLEE AND NOT BY TAM.

There is no evidence in the record that as a result of the altercation between appellee and Tam on the afternoon of July 9th, it was impossible for appellee to return to work under Tam's supervision on the morning of July 10th as he was instructed to do. And at a later point in this brief it will be argued that no such impossibility in fact existed.

But even if it were assumed that it was impossible for appellee to return to work under the supervision of Tam, there is no conceivable basis for the Court's conclusion that such impossibility was created by Tam. As a foreman, Tam, obviously, was under certain obligations

to appellant. One of those obligations was to instruct appellee with reference to the manner in which the latter was to do his work and appellee was obliged to obey those instructions. Tam did issue instructions. Appellee refused to obey and solely as a result of such disobedience an argument ensued. Under these circumstances how can it be said that Tam created an impossible condition?

Clearly, if it be assumed that an impossible condition resulted from the altercation, such condition was created by appellee and not by Tam. Appellee, by his disobedience, caused an argument. The argument resulted in the so-called impossible condition. Therefore appellee caused the impossible condition, if one existed.

(e)
(f) WHERE ONE PARTY TO A CONTRACT RENDERS FURTHER PERFORMANCE IMPOSSIBLE HE CANNOT ENFORCE PERFORMANCE BY THE OTHER.

Assuming, but not conceding, that it was impossible for appellee to return to work under the supervision of Tam, it has been demonstrated above that such impossibility was created by appellee. Under these circumstances on well settled authority appellee would have no right to insist on performance of the employment contract by appellant.

Taylor v. Sapritch (1940), 38 Cal. App. (2d) 478, 481; 101 P. (2d) 539;

Ray Thomas, Inc., v. Cowan (1929), 99 Cal. App. 140; 277 P. 1086.

On the contrary appellant would have the right to recover from appellee by reason of his creating the impossible condition.

Pacific Venture Corporation v. Huey (1940) 15 Cal. (2d) 711, 717; 104 P. (2d) 641.

II.

The Uncontradicted Evidence Establishes That Appellant's Refusal to Transfer Appellee to Another Job and Instructing Him to Return to Work Under the Supervision of Foreman Tam Was Consistent With Appellant's Rights Under the Employment Contract, Did Not Amount to a Wrongful Discharge, and the Court's Findings and Conclusions to the Contrary Are Wholly Without Support in the Record.

The trial court apparently took the position that appellee's insubordination and the resulting altercation with Tam gave appellant the right to exercise one of only two alternatives, *i. e.*, either to fire appellee or transfer him to another job. With all due respect appellant contends that the court erred in taking this position.

(a) RESUMPTION OF APPELLEE'S DUTIES UNDER THE SUPERVISION OF TAM DID NOT INVOLVE AN IMPOSSIBILITY.

Certainly there is nothing in the record even remotely tending to indicate that it was physically impossible for appellee to return to work under Tam's supervision. And that was all he was instructed to do on the morning of July 10th, *i. e.*, report to Tam for work as usual. If he had merely reported to Tam he would have fulfilled the instruction given to him by Vessels. If he had done that and if Tam had deliberately assumed a hostile attitude to a degree rendering it impossible for appellee to perform his work it would have been time enough for appellee to apply for transfer to another job. But there is no evidence that such a situation would have resulted and appellee stands guilty of deliberately refusing to take

the first simple step toward purging himself from his insubordination.

The only conceivable basis for a conclusion that an impossibility existed would be some substantial evidence of a threat to appellee's personal safety if he did report to Tam for work. But the record does not disclose any substantial evidence of the existence of such a threat. The record only discloses that at the end of a working day and under working conditions which appellee described [Tr. p. 61] as "intense heat and high humidity and very, very depressing" the argument between appellee and Tam reached a point where both men squared off and there was at that moment, in the language of the court, a threat of "great physical violence to one or both of these parties." But no blows were struck and the court found that at that point the good judgment of these two men came into play and a physical encounter was thereby avoided. [Tr. p. 267.] There is nothing in such a situation which would support a conclusion that after a full night's "cooling-off" period Tam's good judgment would have suffered a relapse or that appellee would have been in any physical danger. Project Manager McAuliffe investigated into the circumstances of the dispute sometime prior to appellee's refusal to report on July 10th and McAuliffe found that Tam was not opposed to appellee's returning to work as usual. [Tr. pp. 193-194, 197, 204, 215.] The only thing required of appellee under these circumstances was that he should return to work and continue to exercise his good judgment, this time in the direction of obedience to the instructions of his superior. Such conduct would undoubtedly have been a wholesome start toward peaceful conditions of employment.

(b) THE EXPRESS TERMS OF THE EMPLOYMENT AGREEMENT REQUIRED APPELLEE TO RETURN TO WORK AS INSTRUCTED.

As demonstrated above under the express terms of the employment contract it was appellee's duty to "obey all lawful orders given by the Company, its Manager, or other duly authorized person or persons." [Tr. p. 45.] The order for appellee to return to work was issued by the authority of Project Manager McAuliffe [Tr. p. 194] through Assistant Project Manager Vessels. [Tr. pp. 175, 253.] There was obviously nothing illegal about this order and nothing to prevent appellee from obeying it.

(c) THE MERE FACT THAT OBEDIENCE TO ORDERS MAY BE PERSONALLY UNPLEASANT IS NO EXCUSE FOR DISOBEDIENCE.

A return to work under the supervision of Tam whose authority he had flagrantly disregarded was doubtless a distasteful prospect to appellee. As seen above, however, appellee had only himself to blame for this situation. And regardless of who is to blame for a situation rendering an employee's duty unpleasant it is well established that such unpleasantness is no excuse for willful refusal to perform.

As stated in *Fraser, Master and Servant* (p. 71):

"Of course the master cannot compel him to obey further than has been agreed between them, or than is consistent with law; but at the same time the servant is not entitled to enter upon a minute measurement of the exact limits of his service, or to weigh in too nice a balance the precise kind and quantity of labor which he can in strict law be compelled to perform. While the servant will be

protected from harsh treatment, on the one hand, it is, on the other, incumbent upon him to render a cheerful and ready obedience in all points which, in the judgment *boni viri*, cannot be considered any departure from the contract.”

In the leading California case of *May v. New York Motion Picture Corp.* (1920), 45 Cal. App. 396; 187 P. 785, it is said (45 Cal. App. 404):

“The master has the right to make a reasonable order though he knows it will be distasteful to the servant, and even though he gives the order with the expectation that the servant will leave his employ rather than obey.”

III.

The Court's Finding That Appellant's Conduct Made it Impossible for Appellee to Further Perform the Employment Contract Is Wholly Without Support in the Record.

Appellant is firmly convinced that what has been said above amply demonstrates that Tam did not create a condition rendering it impossible for appellee further to perform under Tam's supervision and that the order of McAuliffe and Vessels for appellee to return to work was wholly consistent with appellant's rights under the contract. This being so there remains for consideration the court's finding that

“this order of Mr. Vessels and Mr. McAuliffe created a situation that made it impossible for the plaintiff to further perform, and could result in only one thing, and that is a termination of the contract.”

[Tr. p. 269.]

Appellant respectfully contends that said finding is wholly without support in the record.

(a) THE ONLY LOGICAL INFERENCE TO BE DRAWN FROM THE RECORD IS THAT APPELLANT MADE IT POSSIBLE FOR APPELLEE TO RESUME PERFORMANCE IN SPITE OF HIS DELIBERATE DISOBEDIENCE.

Immediately following the altercation between appellee and Tam there occurred the conversation between appellee, Vessels and McAuliffe in the course of which appellee stated his version of the dispute and asked to be transferred to another job. [Tr. pp. 65-66.] McAuliffe agreed to investigate the affair, although mentioning the policy of the Company against transferring the workmen around from one foreman to another at the request of the men since such a practice would result in losing authority over the men. [Tr. p. 193.] He ordered appellee to report back to Vessels on the following morning for an answer. [Tr. p. 193.] When appellee reported back and after his conversation with Gratz, whose attempt at discharge the trial court found was not accepted by appellant [Tr. p. 268], Vessels ordered appellee to return to work under the supervision of Tam. The record shows that this order was made plain to appellee but that he nevertheless refused it, left the jobsite and returned to his quarters in the main camp at Awali where he went to bed. [Tr. p. 68.]

The order for departure from the island under these circumstances was of course strictly within the rights of appellant as expressly provided in clause 11 of the contract. [Tr. p. 46.]

On the basis of these uncontradicted facts appellant respectfully contends that the trial court was in error in its conclusion that appellant made it impossible for appellee to further perform the contract. On the contrary the record compels the conclusion that appellant did everything within reason to help appellee in spite of himself. But appellee would not be helped.

IV.

Appellant Voluntarily Abandoned His Rights Under the Employment Contract by Refusing to Report for Work as Instructed by Appellant and the Court's Findings and Conclusions to the Contrary Are Wholly Without Support in the Record.

Appellee demonstrated on the afternoon of July 9th that he had not taken and would not take orders from Tam. He then made a request for transfer to some other job and reported to Vessels on the morning of July 10th, apparently hoping that he would continue in the employment in some other capacity.

(a) APPELLEE'S WILLINGNESS TO CONTINUE IN THE EMPLOYMENT WAS SUBJECT TO THE CONDITION THAT HE BE TRANSFERRED TO ANOTHER JOB.

Appellee's disposition toward Tam's authority, as indicated in the altercation of July 9th, his application for transfer to another job, and his refusal to report to Tam on the morning of July 10th is proof to a demonstration of the fact, found by the trial court, that appellee's willingness to further perform the employment contract "was conditioned upon the fact that he would not be directly under the supervision of Foreman Tam." [Tr. p. 268.] He would not work for Tam under any circumstances.

(b) THE CONDITION UPON WHICH APPELLEE'S WILLINGNESS TO CONTINUE IN THE EMPLOYMENT WAS BASED WAS WHOLLY UNWARRANTED AND WAS THE EQUIVALENT OF RESIGNATION.

As demonstrated above appellee had expressly promised to serve appellant as a boilermaker or in such other capacity as appellant might require and to obey all lawful

orders given by appellant, its manager or other authorized person.

Project Manager McAuliffe issued instructions for appellee to return to work under the supervision of Tam. Clearly there was nothing illegal about this instruction and therefore under the express terms of the contract appellee was bound to obey. But appellee was unwilling to obey the instruction given. He attached a condition to his willingness and the condition was not authorized by any provision in the contract or by law, as shown below.

Appellee's willingness to continue in the employment was subject to a condition precedent, to wit, that he be transferred to another job. He in effect said: "Unless I am transferred, I will quit." And since he had no right to insist upon the unwarranted condition, he in effect resigned at the moment he demonstrated such insistence. This may have occurred, and in view of all the circumstances it probably did occur, at the moment he left Tam on July 9th and asked Vessels and McAuliffe for a transfer and at the very latest it occurred on July 10th when appellee refused to report to Tam for work. That demonstration amounted to a total breach of the contract by appellee.

Whether or not appellee's manifestations of an unwillingness to report to Tam for work in themselves amounted to a resignation, there is no doubt that his actual refusal to report to Tam constituted a resignation. At that point he was clearly required to report to Tam but he chose rather to return to his quarters at Awali. By his conduct, if not by words, appellee clearly said, "I will not report for work as instructed; I quit." This being true it follows that there can be no recovery.

The case is almost identical with the situation presented in *Phelps v. Fuchs & Lang Mfg. Co.* (N. J. 1911), 81 Atl. 729, wherein Phelps the employee, had agreed to serve under the supervision of one Ford. Phelps had an altercation with a shipping clerk who disputed his authority. When Phelps reported the matter to Ford the latter sustained the shipping clerk whereupon Phelps said "I will quit." Later Phelps went to higher authority for the avowed purpose of having Ford overruled. He failed in this purpose and in refusing him any relief in his action for damages for breach of the employment contract the New Jersey Court said:

"having failed in this purpose, he did not accept the situation and return, or attempt to return, to his work, but remained away. All that Ford did was to insist that the plaintiff had quit, and if such insistence was justified by plaintiff's words and conduct, and we conclude it was, no illegal discharge could be implied from facts which conclusively demonstrated that the plaintiff had abandoned the service."

In *Wiley v. California Hosiery Co.* (1893), 3 Cal. Unrep. 814; 32 Pac. 522, the employee, after a dispute with the employer, received a letter from the employer offering to continue the service if the employee would comply with instructions. This he refused to do and the court said (3 Cal. Unrep. 821):

"That request being reasonable, under the circumstances, we are led to conclude that the plaintiff voluntarily, and without sufficient reason, quit the defendant's employ."

See also, Restatement of Law of Contracts, §§ 314, 317, 318.

V.

Assuming That Appellee Was Discharged, His Refusal to Obey the Instructions of His Superiors Constituted Sufficient Cause for Such Discharge and the Court's Findings and Conclusions to the Contrary Are Wholly Without Support in the Record.

Appellant tried the case in the court below on the theory that appellee resigned from the employment or, in the alternative, that if he was discharged there was ample justification therefor. Appellant believes that the argument preceding this point fully supports the theory of resignation. Appellant desires, however, to present its argument on the alternative theory in order that the case may be fully presented.

(a) UNDER THE EXPRESS TERMS OF THE CONTRACT AND AS A MATTER OF LAW APART FROM THE CONTRACT THERE WAS SUFFICIENT CAUSE FOR APPELLANT TO DISCHARGE APPELLEE.

Under the express terms of the contract, in view of the facts, and *the court's finding of deliberate insubordination* [Tr. p. 267], appellant clearly had the right to discharge appellee. The contract, in clause 10 [Tr. p. 46] expressly provides:

"Company may summarily terminate Employee's service hereunder at any time for Cause, such as insubordination, * * *."

and in clause 12(b) [Tr. p. 47] the contract provides:

"In the event that Employees services hereunder shall be terminated by the Company for Cause during the Employee's full term of service hereunder * * * Company shall be under no obligation to pay,

or to contribute in any manner to the expenses of the Employee's passage to his Home nor to pay Employee any salary for the time consumed in returning thereto or for any other period beyond the date of such termination. Company may, at its discretion, purchase for Employee, at Employee's expense, tickets or vouchers good for Employee's return passage or any portion thereof, and Company is hereby authorized to withhold and retain from any sums due from Company to Employee the amount necessary to recover the cost of any tickets or vouchers so purchased."

Apart from the express terms of the contract, the law is clear that an employer may discharge an employee for a single act of disobedience. The leading California case on the subject is *May v. New York Motion Picture Corp.* (1920), 45 Cal. App. 396, 187 Pac. 785. The rule is therein stated as follows (45 Cal. App. 403-404):

" 'Wilful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty—a breach of the contract of service; and like any other breach of the contract, of itself entitles the master to renounce the contract of employment. According to the decided preponderance of authority, a single act of disobedience to a specific, reasonable order from the master to the servant is, as a matter of law, a violation of duty that justifies the master in discharging (*Labatt's Master and Servant*, 2d ed., sec. 291, p. 897); and whether actual injury has resulted to the master's business is wholly beside the mark."

See, also:

Bank of America v. Republic Productions (1941),
44 Cal. App. (2d) 651, 654, 112 P. (2d) 972.

And in *Forsyth v. McKinney*, 8 N. Y. S. 561, 562, the court said:

"It is the right of the employer to establish rules. If a workman, on seeing these rules, is dissatisfied with them, he need not accept the employment. If he accepts it, however, he must obey the rules. If he disobeys the rules, he breaks his part of the contract, because it is a part of his contract to obey them. *The plaintiff in this case is not suing to recover for work which he has performed. He is suing for a breach of the alleged contract to employ him for a year. He must then show that he has performed his part of the contract. If he has broken his side, he cannot compel the defendants to keep theirs, or recover damages if they do not continue to observe a contract which he has broken.*"

(b) THE CAUSE FOR DISCHARGE WAS NOT CONDONED.

The court apparently took the position that when McAuliffe, in the conversation of July 9th, instructed appellee to report back to Vessels on the morning of July 10th, McAuliffe thereby elected to condone appellee's refusal to obey Tam's instructions. The court found that McAuliffe and Vessels thereby "elected, on the contrary, to overlook what had occurred, and directed plaintiff to report back for work the next day." With all respect, appellant contends that this finding was clearly erroneous and is without support in the record.

The altercation between appellee and Tam preceded the conversation between appellee, Vessels and McAuliffe only by enough time to permit appellee to walk from the bubble tower to the nearby bus station. Obviously, McAuliffe had not even heard of the altercation before that time, much less Tam's version of it. And it is fantastic to

assume that, without knowing whether or not insubordination existed, McAuliffe could elect to condone it. Election involves an informed choice. And since McAuliffe did not have the necessary information, he was in no position to elect. The rule is stated in 39 Corpus Juris, Master and Servant, as follows (Sec. 89):

“A master who, *after knowledge* of a material breach of contract on the part of his servant, continues to accept his services without reasonable cause for delay in discharging him, is presumed to have waived the breach, and will not be allowed to set it up afterwards. Although the conduct of the master in continuing to accept the services of the servant *after the knowledge* of a material breach of contract on the latter's part is *prima facie* condonation of the offense in the absence of any explanation, it does not, as a matter of law, establish a waiver of his right to discharge him, *and the master does not waive his rights by postponing action until he is fully satisfied of the servant's guilt.*”

It is clear from the record that McAuliffe's only purpose in requesting appellee to report to Vessels on the morning of July 10th was to give himself time to investigate the circumstances of the case in order to make an intelligent decision. Appellee's testimony was that McAuliffe listened to his version of the dispute with Tam and replied to his request for a transfer as follows [Tr. p. 170]:

“Well, we are going to stop this transferring, put a stop to it. *We will sec.* You come back out in the morning and report to * * * Harold Vessels.”

McAuliffe testified as follows: [Tr. p. 193]:

"I told him that just on the spur of the moment I would not give him an answer; that our policy was strongly objecting to transferring men around because we have no authority on the job and we wouldn't get our work done. We were over there to do a certain job and a certain foreman would be assigned to certain work and the men were assigned to the foremen, and in order to have an organization they would have to work that way, but I would not give him a yes or no answer. *I would investigate the circumstances. So I told him I would check it up and asked him to come back the next day.*"

Under these circumstances it is clear that McAuliffe's instruction of July 9th could not have amounted to condonation and, under the rule of law above set forth, in view of appellee's refusal to report to Tam, neither did Vessel's instructions on the morning of July 10th amount to a condonation.

(c) THE EXISTENCE OF SUFFICIENT CAUSE FOR DISCHARGE FOLLOWED BY AN ACTUAL DISCHARGE IS A COMPLETE DEFENSE.

Appellant did not expressly discharge appellee, but the court found that by a course of conduct it accomplished the same result. Assuming, but not conceding, this to be true, it nevertheless results that appellee has no cause of action.

An employer, in discharging an employee, need not show that he in fact acted upon some proper ground of dismissal. It is sufficient if any ground for the discharge existed at that time. I Labatt, *Master and Servant*, Sec. 189. In fact, it is not even material whether the employer

knew of grounds which in fact existed at the time of discharge. *Re Milwaukee Motor Co.* (C. C. A. 7), 246 Fed. 671. Or he may justify a dismissal by relying on a ground different from that assigned at the time of discharge. *Von Heyne v. Tompkins* (Minn.), 93 N. W. 901. See 35 American Jurisprudence, *Master and Servant*, Sec. 37.

There was ample cause for the discharge of appellee in this case, consisting in his disobedience to the orders of Tam on and prior to July 9th and his disobedience to the orders of Vessels on the morning of July 10th. Therefore, if he was discharged, however the discharge was accomplished, appellee has no cause of action.

Conclusion.

For the foregoing reasons, it is respectfully urged that the trial court erred in entering judgment for appellee, and appellant prays that said judgment be reversed, with instructions to enter judgment for appellant.

Respectfully submitted,

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JACKSON W. CHANCE,

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Of Counsel.

APPENDIX.

The Court: I am not going to attempt to detail the evidence, as I see it, nor to summarize it at length, except as I shall make some reference to it in making a disposition of this controversy.

The first matter that we must give consideration to, naturally, is this written contract of employment. Ordinarily we do not have in a situation of this kind, if it were domestic rather than foreign service, a written contract of employment. I daresay that almost 99 per cent of employment contracts between an individual and a construction corporation are on an oral basis. But here the employer was taking the employee many thousands of miles from his home in a period of war, when travel was much restricted, and when it was extremely expensive, and when only such movements and such activities as are indicated by this contract were engaged in by reason of the part which they played in the war effort itself. This contract of employment undoubtedly was one that was drawn by the employer, and then signed by it and the employee here. Being drawn by the employer, of course, it cannot be interpreted favorable to the employer, in any interpretation of it and its terms. The three paragraphs that bear directly upon the issues here are the covenants contained in paragraphs 6, 9 and 10. 6 recites the obligations that the employee assumes, and 9 has a special provision for the termination of the contract by [278] either of the parties, and 10 provides for a termination of the contract and liabilities thereunder by the employer, if they should elect to do so and if they have a sufficient cause for doing so.

It is the contention of the plaintiff that without cause he was discharged and the contract was breached, and

that the liability arises for the loss that he sustained during the remaining period of this contract, which was an 18 months contract, as I recall it. Performance had proceeded for about a month, or a little longer period of time, under the contract.

The defendant contends that the plaintiff summarily ceased to perform under the terms of the contract, and, therefore, is not entitled to any recovery.

In attempting to arrive at what the actual facts were in this case, I cannot, of course, adopt the testimony of either the plaintiff or the defendant to the exclusion of the other, because there is nothing in this situation that would indicate to the court that all truth lies on one side and all error on the other. I must attempt, in so far as it is humanly possible to do so, to visualize the situation as it must have occurred 10,000 miles away out there in the Mediterranean Ocean, on some little island, where a terrific and hurried effort was made to bring into future utilization that great essential in carrying on the war, additional [279] petroleum supplies.

It is totally beside the question here as to whether Mr. McDonald, the plaintiff in this case, or Mr. Tam, his immediate foreman were the better qualified to judge as to the means and methods and procedures in construction, and I am not going to attempt to determine that, other than to say in passing that Tam must have possessed some of the essential qualifications for this rather complex construction, as well as did the plaintiff, Mr. McDonald.

It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles.

He made no real effort to do that, and he didn't intend to do it, and, certainly, if this were not at a place far distant from this country and under the situations that here prevailed, he committed an act that would have been the basis of a summary cancellation of the contract and all liabilities by the employer.

I must find that the order to proceed with construction, as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination. And I do find that Tam after this altercation,—that the altercation was not a mere passing difference, it [280] was one that at the moment threatened great physical violence to one or both of these parties, and but for the good judgment somewhat on both sides it didn't break out into an actual physical encounter, but it resulted in a situation, under working conditions such as must have prevailed here, where these two men simply could not live side by side even through working hours thereafter. Tam undoubtedly stated that McDonald was discharged, but he did not have the authority to discharge him and abrogate McDonald's rights under this contract, because he himself occupied a subordinate position.

It appears from the evidence in this case, so far as the workmen were concerned, if there was any authority to discharge, it was with this man Gratz, although he was, in the final analysis, only an employee of the defendant company. But he was the superior of Tam. Certainly, under the procedure there prevailing, when he said a man was discharged, and there is something in the evidence that supports this conclusion of the court, that would be

a discharge except that there be intervention by someone still higher, and the next in authority was a direct representative of the employer, the parties obligated under this contract, and that was Mr. Vessels, and his superior, Mr. McAuliffe, who was the man finally in authority and who made determinations.

I must find that on the evening of July 9th, following [281] the altercation between the plaintiff and Tam, the matter came to the attention of Vessels, and Vessels' superior, Mr. McAuliffe, and they did not elect to find that there was insubordination. They might have done so, and then this court would be confronted with an entirely different problem. But they elected, on the contrary, to overlook what had occurred, and directed the plaintiff to report back for work the next day. He did report back, and then, whether it was before or after his further contact with Vessels and McAuliffe, he contacted Gratz, who was the superior of Tam, and who evidently was the man on this particular job that had some real authority. Gratz advised the plaintiff, and the court has no hesitancy in finding it was not in any friendly tone, that the plaintiff should have brought his troubles to his superior in the boilermakers' organization, that is, Mr. Gratz, and not have gone to the employer, Vessels and McAuliffe. He was angry about that, and then he affirmed what his subordinate, Mr. Tam, had said and done, and said, "You are discharged."

Now, still the parties primarily liable under this contract, through their representatives, didn't accept the action of either Tam or Gratz, except to this extent: when

the plaintiff reported to them, and plaintiff was then perfectly willing to continue to perform under the contract, but that willingness was conditioned upon the fact that he [282] would not be directly under the supervision of Foreman Tam, he was advised to go back to work, but under the immediate and direct supervision of the man that the court must find, from the situation as it is disclosed by the evidence here, created an impossible condition and he could not have worked there and would not have been able to continue long because of the tremendous bitterness that had been engendered because of the encounter of the day before. There is no necessity for me to determine who was the man to blame. So this order of Mr. Vessels and Mr. McAuliffe created a situation that made it impossible for the plaintiff to further perform, and could result in only one thing, and that is a termination of the contract.

Now, the court having found that the defendant—I might have misspoken myself before and said the plaintiff—the defendant by a course of conduct terminated this contract, would it follow, as a matter of law, that the liability would be for the life of the contract or would that termination be in accordance with the rights of the defendant under the contract itself? Certainly, if the defendant had written out formally a notice to this plaintiff that: you will remain on the pay roll for 30 days, and thereafter your services will be terminated, and under the contract it was not required to give any reason whatever, it could not have been more effective than what did occur.

I am forced to the [283] conclusion that, as a matter of law, the plaintiff could not and cannot recover herein more than the one month's wages and his transportation back home. The termination is one that was not formal, yet was within the rights of the defendant to make, and the defendant could make it in the manner in which it did, by logical inference to be drawn from undisputed facts, rather than by the formal procedure as provided by the contract itself, that is, a written notice.

For the reasons stated, I shall find that the plaintiff is entitled to recover herein the sum of such an amount as is measured by one month's compensation, plus his transportation back home, less any advances, if there are any. I do not know how those figures finally work themselves out. Findings of fact and conclusions of law and a decree may be submitted next Monday, if possible. That is our law day.

Mr. Chance: Thank you, your Honor.

The Court: Now, if there is any other feature in connection with this case that I haven't made clear in my offhand memorandum judgment or decision, in disposing of it. I would like counsel to state it now, because I trust that you can get together and work out the findings of fact and conclusions of law without bringing the matter back again for further argument.

Mr. Chance: Will counsel prepare and submit the findings to us under the rules, and we will shorten the time [284] so that they can be presented to your Honor?

Mr. Sheridan: Yes. I will prepare a set and submit them to Mr. Chance.

Mr. Chance: I think we understand your Honor's direction.

The Court: Very well. [285]

[Title of District Court and Cause.]

STIPULATION RE FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

It is Hereby Stipulated by and between the parties to the above entitled action, through their respective counsel, that the decision of the court announced from the bench on Tuesday, October 9, 1945, as taken down by the stenographic reporter shall be deemed to be and constitute the findings of fact and conclusions of law in said action and that the reporter's transcript of said oral decision shall, when transcribed (subject to correction of any typographical or other errors contained in the reporter's transcript) constitute the findings of fact and conclusions of law of the court without necessity for a separate statement thereof [68] and without necessity for the court signing the same. A judgment shall be prepared by counsel for plaintiff and presented to the court pursuant to rule of court in accordance with said oral decision. This stipulation shall be without prejudice to the right of either party to urge error in the findings, conclusions, judgment or otherwise.

Dated: October 12th, 1945.

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No. 11222.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a
corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 11222.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a
corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's arguments will be answered in the order in which they appear in Appellee's Brief.

I.

Appellee Breached the Employment Contract.

On page 2 of his Brief, Appellee asserts that he had "demonstrated the fact that turnbuckles were an inefficient and unsuccessful tool to utilize in the task being performed and that all parties here involved had reverted to the use of key plates for the performance of the construction work at hand."

Further, Appellee asserts that at the time of the alteration between Appellee and Tam (his foreman), Appellee had completed the work assigned to him.

The Appellee thereby argues that he, Appellee, fully performed his employment contract. This argument is restated by Appellee on page 4 of his Brief where he contends that:

“In view of the total absence of evidence that the Appellee failed to substantially comply with the directions of his employer, there is no proper basis upon which the Appellant’s contention of error can be founded.”

(a) The Trial Court Expressly Found That Appellee Breached the Contract.

On the contrary, the trial court expressly found:

(1) That it was Appellee’s duty to obey the instructions of Foreman Tam with reference to getting the turnbuckles;

(2) That Appellee made no real effort to obey these instructions and did not intend to obey them;

(3) That it was within Tam’s rights to give the order to proceed with construction; and

(4) That Appellee’s disobedience of this order was equivalent to insubordination. [Tr. pp. 266-267.]

(b) The Court’s Finding of Appellee’s Breach of Contract Is Fully Supported by the Evidence.

The express findings of the trial court that Appellee wilfully refused to obey the lawful orders and instructions of his foreman, Tam, to use turnbuckles in assembling the bubble-tower sections on the day in question, obtains overwhelming support in the evidence. Appellee’s own testimony supports no other conclusion. The testimony of Tam is unequivocal on this issue. [Tr. pp. 71,

81, 128-129, 132.] And Appellee admits the breach at page 3 of his Brief by admitting that he refused to use turnbuckles.

The Appellee's argument about what was the most "efficient" and "successful" tool to utilize in the task of assembling the bubble-tower sections, is wholly beside the point. This is undeniably true because the trial court expressly found it to be immaterial. The trial court found that:

"It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles." [Tr. p. 266.]

(c) The Authorities Cited by Appellee Do Not Support His Argument on the Question of Breach of Contract.

Appellee cites (Brief, p. 4) California Labor Code, Section 2856 which establishes the duty of an employee as that of substantial compliance with all directions of his employer except where such obedience is impossible or unlawful or would impose new and unreasonable burdens on the employee.

This section can afford Appellee no comfort since there was absolutely no compliance, either substantially or otherwise, on the part of Appellee with respect to Tam's order to obtain and use the turnbuckles. Furthermore, Appellee's next statement that there must be "a wilful act or wilful misconduct" by the employee to constitute a refusal to perform (Brief, p. 4) necessarily demonstrates the reversible error latent in this judgment. This,

because the trial court expressly found the refusal of Appellee to be "wilful":

"He made no real effort to do that, and he *didn't* intend to do it . . ." [Tr. p. 266.]

Appellee next cites the case of *Goudal v. C. B. DeMille Picture Corp.*, 118 Cal. App. 407, 5 P. (2d) 432. This was an action by a motion picture actress in which recovery of damages was obtained for an unjustified discharge of the actress from her employment under a written contract. Defendant employer sought to justify the discharge on the ground of disobedience of orders by the plaintiff employee, but the trial court expressly found and on appeal the finding was upheld that in no instance did the employee fail to obey any final order of the employer. The opinion of the District Court of Appeal makes reference to the fact that the employee on several occasions proposed better methods and insisted upon the use of better methods in accomplishing the work assigned to her, but the court also found that on each separate occasion the employer agreed to follow the suggestions. The District Court of Appeal used certain language in its opinion indicating that in its view the presentation of better methods and insistence by the employee upon the use of better methods even though persistently presented do not amount to wilful disobedience or failure to perform services under the contract, but are, rather, consistent with the contract which basically calls for services in the best interest of the employer. But these statements are not the law of this State as evidenced

by the language of the Supreme Court when, in denying a petition for hearing after decision of the District Court of Appeal, in the *Goudal* case, the Supreme Court said (pp. 415-416):

“The petition for a hearing is denied. A perusal of the evidence discloses that in no instance was any final order of the employer disobeyed by the plaintiff and it cannot therefore be said that the conclusion of the District Court of Appeal that the findings are supported by the evidence is erroneous. *It should be stated, however, that we do not wish to be understood as approving any declaration in the opinion unnecessary to or inconsistent with this one ground of affirmance of the judgment.*”

Furthermore, the case at bar is clearly distinguishable from *Goudal v. C. B. DeMille Pictures Corporation*, in that in the case at bar there was an admitted refusal on the part of appellee to obey a final order of Foreman Tam and the trial court was expressly so found.

The case of *Greene v. Hawaiian Dredging Co.*, 26 Cal. (2d) 245, 157 P. (2d) 367, cited by Appellee has no bearing upon the case at bar. That case again did not involve the disobedience of an employee but simply involved the peaceful and orderly presentation of protests regarding working conditions by employees. In the case at bar Appellee did not merely protest regarding the instructions of Foreman Tam. He deliberately disobeyed said instructions and the court squarely so found.

II.

Appellee's Breach of the Employment Contract Was Not Waived or Condoned by Appellant.

Appellee's argument on the subject of waiver under Point I of his brief (Brief pp. 5-6) proceeds upon the premise that Appellee was actually discharged from his employment under the written contract here involved. Contrary to this premise Appellant has argued under Points II and IV of Appellant's Opening Brief that Appellee was not discharged. Appellant believes that the argument there presented sufficiently supports the contentions made. Assuming, however, that Appellee was discharged, Appellant has argued under Point V of its Opening Brief, in the alternative, that there was sufficient cause for such discharge.

(a) There Can Be No Waiver Without Knowledge of the Facts.

All authorities cited by Appellee on pages 5 and 6 of his Brief expressly recognize that waiver is a matter of intention and that there can be no intent to waive a breach of contract in the absence of knowledge of the facts constituting the breach.

Appellant believes that the argument set forth under Point V of its Opening Brief sufficiently demonstrates that the alleged waiver found by the court was not based on any knowledge by Appellant of the true facts.

The trial court's finding of waiver was as follows:

"I must find that on the evening of July 9th, following the altercation between the plaintiff and Tam, the matter came to the attention of Vessels, and Vessels' superior, Mr. McAuliffe, and they did not elect to find that there was insubordination. They might

have done so, and then this court would be confronted with an entirely different problem. But they elected, on the contrary, to overlook what had occurred, and directed the plaintiff to report back for work the next day." [Tr. p. 268.]

Obviously, at this point neither McAuliffe nor Vessels were fully acquainted with the facts for they had not heard Tam's version of the dispute. The record is without contradiction that, at this point, McAuliffe and Vessels merely instructed Appellee to return to work on the following day *pending* their investigation of the facts in order that they might make an intelligent decision in response to Appellee's request that he be transferred to another job. Appellee points to the testimony of McAuliffe in which the latter, after testifying that he made an investigation concerning Appellee's request for a transfer [Tr. pp. 216-217], stated that he did not see any reason why Appellee should be transferred and likewise did not see any reason why he should be discharged and Appellee states that "it is upon the above facts and law that the appellee respectfully submits that the breach, if any, of appellee was waived by the appellant." This, of course, is an entirely different ground of waiver than that relied upon by the trial court as evidenced by the court's finding above quoted. But Appellee's purported ground of waiver is likewise without support.

McAuliffe did not merely refuse to transfer appellee but actually issued instructions for appellee to return to work as usual. [Tr. p. 194.] Appellee refused this instruction just as arbitrarily as he had refused Tam's instructions the day before. Appellee's breach, therefore, was of a continuing nature and thus McAuliffe's instructions could not amount to a waiver.

The principle is well stated in the case of *Gray v. Shepard* (N. Y.) 41 N. E. 500 at 501-502:

“The claim that the defendant, by retaining the plaintiff in his employment after knowledge of violations of duty, thereby condoned these offenses, and that they could not thereafter be used as grounds for discharge, is without force, in view of the fact that his violations were committed from time to time, continuing until the discharge. The master may overlook breaches of duty in the servant, hoping for reformation; but if he is disappointed, and the servant continues his course of unfaithfulness, he may act in view of his whole course of conduct, in determining whether the contract of employment should be terminated.”

And in *Gordon v. Dickinson* (W. Va.), 130 S. E. 650 the court said (p. 652):

“The proposition relied on by counsel for plaintiff, on the question of waiver and condonation, is that where an employer has knowledge of the misconduct and negligence of his employee and without complaint continues him in his service, such misconduct or omission of duty cannot be made the sole ground for his discharge. But conceding the general rule, defendant’s counsel reply that, if there be a repetition of such negligent acts and misconduct, the employer has the right to take into consideration the whole course of conduct of his employee as grounds for his discharge. This proposition seems well founded in reason and authority. In 18 R. C. L. p. 517, §27, the exception to the general rule contended for by plaintiff’s counsel is stated thus:

“ ‘This rule, however, is subject to the qualification that a master has a reasonable time, after ascer-

taining that the servant has broken his contract, in which to discharge him—in other words, waiting a reasonable time before acting will not amount to a waiver of his right. Again, if there has been a repetition of offenses the employer has a right to take the entire record into account.’ ”

and, again, at page 653, the court said:

“And the law is well settled that the condonation of prior breaches of a contract is always with the implied condition of future good conduct in compliance with the terms of contract.”

(b) The Authorities Cited by Appellee in Support of His Argument of Waiver Are Not in Point.

Appellee cites (Brief p. 5) Restatement of Contracts, Sections 309 and 310. These sections specifically recognize that waiver must be accompanied by knowledge of the facts or, if such knowledge is absent, that the party having the right must unreasonably mislead the other.

But in this case it cannot be said either that McAuliffe had knowledge of the facts when he first told Appellee to report back for work the next morning or that there was any misleading of Appellee since Appellee was at no time willing to return to work under the supervision of Tam.

Appellee cites (Brief p. 5) *Page v. Washington Mutual Life Ins. Assn.*, 20 Cal. (2d) 234, 125 P. (2d) 20, and *Spiegelman v. Metropolitan Life Ins. Co.*, 21 Cal. (2d) 299, 68 P. (2d) 1006. These are both cases involving waiver of payment of insurance premiums within the

grace period. In each case the defendant insurance company unconditionally accepted the late payment of premiums and the cases are, therefore, not in point here. Appellee was not willing to and did not render any further performance and there was nothing for appellant to accept.

Appellee refers (Brief p. 6) to the case of *Goold v. Singh*, 88 Cal. App. 339, 263 Pac. 548, as a "leading case." In fact the case has been cited twice in its history and on neither occasion was it cited in support of the point relied upon by Appellee. Furthermore, Appellee has apparently inadvertently stated his conception of the holding in that case in the form of a quotation from the opinion, whereas in fact the matter included within Appellee's quotation marks will actually not be found in the opinion in those words. A correct quotation from *Goold v. Singh* on the point here involved is as follows (88 Cal. App. at 343):

"The right to declare a forfeiture for the breach of a condition may be waived; and a waiver may be implied from the acts of the vendor after a breach by which the continued validity of the contract is recognized (*Boone v. Templeman*, 158 Cal. 290 [139 Am. St. Rep. 126, 110 Pac. 947]; *Stevinson v. Joy*, 164 Cal. 279 [128 Pac. 751]; *Hermosa Beach etc. Co. v. Law Credit Co.*, 175 Cal. 493 [166 Pac. 22]). A waiver, however, being the intentional relinquishment of a known right after knowledge of the facts (*Wienke v. Rich*, 179 Cal. 220 [176 Pac. 42]), the acts alleged to have had that effect must have been done with full knowledge of the right to declare a forfeiture (*German-American etc. Bank v. Gollmer*,

155 Cal. 683 [24 L. R. A. (N. S.) 1066, 102 Pac. 932]; *Goodwin v. Grosse*, 56 Cal. App. 615 [206 Pac. 138]), and whether there has been a waiver is a question of fact to be determined by the trial court (*Kerr v. Reed*, 187 Cal. 409 [202 Pac. 142]; *California etc. Hotel Co. v. Callender*, 94 Cal. 120, 126 [28 Am. St. Rep. 99, 29 Pac. 859]), unless but one inference can reasonably be drawn from the evidence (*Lompoc Produce etc. Co. v. Browne*, 41 Cal. App. 607 [183 Pac. 166])."

Frank v. New Amsterdam Casualty Co., 175 Cal. 293, 165 Pac. 927, and *Silverberg v. Phoenix Ins. Co.*, 67 Cal. 36, 7 Pac. 38, cited by Appellee (Brief p. 6), likewise do not support Appellee. In the former case the defendant surety company had taken over the defense of a lawsuit for plaintiff and, after having lost the case, and having failed to take an appeal as it had agreed to do, attempted to escape liability for a loss under a technical provision in the surety contract. The finding of waiver was obviously supported by both the knowledge of defendant and the justifiable reliance placed in defendant by plaintiff but neither fact exists in this case. In the *Silverberg* case defendant insurance company had examined all witnesses and vouchers produced by insured and stated that a fire loss would be paid after the expiration of a 60-day period provided in the contract. Defendant permitted the full 60-day period to expire and then attempted to declare the contract forfeited on the basis of a technical provision therein. Again the evidence of knowledge was clear and convincing, a fact which does not exist in this case.

III.

**There Is No Support in the Record for the Finding
That Appellant Made It Impossible for Appellee
to Perform.**

Under Point II of his Brief (at page 7), Appellee cites a number of authorities in support of the proposition that where one party to a bilateral contract prevents performance by the other party or makes such performance impossible the former thereby commits a breach of contract and the latter's duty of performance is excused. Appellant does not challenge the correctness of this proposition as a general principle of law but does insist that neither the principle nor any of the authorities cited in support of it has any application to the facts of this case.

The finding of the trial court was that Tam created an impossible condition and that Appellant made it impossible for Appellee to perform further by insisting that Appellee return to work under Tam. Appellee's argument under Point II of his Brief boils down to the proposition that although he was ready, able and willing to complete his contract, *if assigned to work under another foreman*, Appellant arbitrarily refused to give him such assignment despite Appellant's wide range of choice in the matter.

It is respectfully submitted that the court's finding and Appellant's argument do not even attempt to meet the real issues involved, *i. e.*, the question of what the alleged impossibility or prevention of performance consisted of, or the question of who created it if it did exist.

(a) Further Performance by Appellee Was Not Prevented or Made Impossible.

The court placed its finding of impossibility on the ground of bitterness engendered between Appellee and Tam because of the altercation of July 9th. [Tr. p. 269.] Appellant respectfully submits that the lack of any foundation for this finding was clearly demonstrated under Point II(a) of Appellant's Opening Brief. There was no physical impossibility involved in this situation and the only thing required of Appellee was that he return to work under Tam's supervision and recognize the latter's authority as he had agreed to do under his contract of employment. Appellee does not attempt to show that there was anything to prevent Appellee from doing this and there is absolutely nothing in the record to show that it was impossible.

In his argument Appellee is content to assume that it was impossible for him to return to work under the supervision of Tam and that he was therefore entitled to a new assignment.

This assumption must find some support in the record or its invalidity must be conceded. With two exceptions all citations to the record furnished by Appellee under Point II of his Brief are aimed at proving that Appellee requested a transfer to another foreman and was willing to continue in the employment only on that condition, and that his request for a transfer was refused. But there is no issue as to these facts as evidenced by the argument under Point IV of Appellant's Opening Brief and these references are therefore not material. In one of these two exceptions, Appellee refers to the record to show that there were other boilermaker foremen besides Tam on the Bahrein Project. But again there is no issue involved

for the fact just mentioned was set forth in Appellant's statement of the case at page 3 of its Opening Brief. The only attempt by Appellee to support his gratuitous assumption of impossibility and his alleged right to be transferred is the quotation (Brief, p. 8) of a clause of the employment contract which, in unmistakable language, gave Appellant the right to decide where Appellee should work and imposed upon Appellee the duty of abiding by that decision. From this clause, and by a process of patently specious reasoning, Appellee attempts to torture his duty to abide by Appellant's decision into a right to demand a new assignment, and to convert Appellant's right of decision into a duty to comply with Appellee's demand. Reduced to its essence then, Appellee's argument is that performance by him was prevented or rendered impossible simply because his employer refused to let him usurp the employer's exclusive right. This argument is so clearly wrong that it does not call for further answer.

**(b) Even Assuming That an Impossibility Existed It Was
Not Created by Appellant.**

Appellant certainly does not concede that it was impossible for Appellee to have returned to work under the supervision of Tam as he was instructed to do, but earnestly contends that the contrary is demonstrated under Point II(a) of Appellant's Opening Brief. But even if it is assumed that it was impossible for Appellee to return to work under Tam there remains for decision the question of who created the impossibility. Appellee does not attempt to meet this issue anywhere in his brief. And

neither did the court attempt to meet it in making its findings for, in reference to the altercation between Appellee and Tam, the court expressly said [Tr. p. 269]:

“There is no necessity for me to determine who was the man to blame.”

Obviously the impossibility, if any, resulted solely from the altercation following Appellee's deliberate refusal to obey Tam and it was either originally created by Appellee or by Tam. The trial court at one point found that there was no necessity for the court to determine who was the man to blame for the altercation and at another point found that the impossibility was originally created by Tam. Appellant earnestly believes that the argument under Point I of Appellant's Opening Brief demonstrates that this finding of the trial court is wholly without support in the record and is inconsistent with the prior findings that Appellee deliberately disobeyed Tam's instructions and that such disobedience was equivalent to insubordination. Appellant earnestly contends that the trial court's findings and Appellee's argument merely assume that Appellee was entirely innocent in the matter and that Tam alone was at fault. But there is nothing in the record in support of the court's findings or Appellee's position on this point.

(c) The Authorities Cited Under Appellee's Point II Do Not Support His Position.

At page 7 of his Brief, Appellee partially quotes the opening clause of Restatement of Contracts, Section 315, to the effect that where one party to a contract prevents

performance by the other the former thereby breaches the contract. But Appellee omits the next clause in the sentence which reads "*unless (a) the prevention or hindrance is caused or justified by the conduct of the other party.*" This rule is not concerned with the question of the existence or nonexistence of prevention but merely with the effect of prevention and it recognizes that where, as here, the prevention, if any, is caused or justified by the conduct of a party he cannot be heard to complain about it.

Potts v. Village of Haverstraw, 79 F. (2d) 102, cited by Appellee (Brief, p. 7), was an action by an engineer against the village to recover for breach of an alleged contract whereby the engineer was purportedly employed to design and supervise the construction of a waterworks system. In the course of its opinion the court assumed, *arguendo*, that if there was a contract between the parties, defendants impliedly promised not to prevent performance by plaintiff but held that in fact there was no such contract.

Steel Tank and Pipe Co. v. Pac. Fire Extinguisher Company, 69 Cal. App. 225, 230 Pac. 978 (Appellee's Brief, p. 7), holds that one, who had agreed to sell and deliver a certain steel tank, was not, in the absence of an agreement to that effect, bound to submit to defendant's demand that a union crew be employed to effect the delivery. And Appellee cites this case in support of his contention that Appellant was bound to submit to his demand for a new assignment. The case is squarely against Appellee.

Connell v. Higgins, 170 Cal. 541, 150 Pac. 769 (Appellee's Brief, p. 7), was an action to recover damages for an alleged breach of a building contract by the owner. On appeal plaintiff claimed that he had substantially performed and that full performance was prevented by defendant. But the trial court's judgment in favor of plaintiff was reversed on appeal the court holding that the pleadings did not present any issue as to prevention of performance and that there was no proof of substantial performance.

Rousseau v. Cohn, 20 Cal. App. 469, 129 Pac. 618, cited by Appellee (Brief, p. 7), was a case where the court, without specifically stating the facts on the question of prevention, merely held that there was evidence in the record sustaining the view that defendant owner, without good reason, refused to permit plaintiffs, who were architects, to complete their contract. The case furnishes no support for Appellee's assumption that he was prevented from performing.

Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979, cited by Appellee (Brief, p. 7), was a case where defendant agreed to furnish all fuel, water, casing and tubing to enable plaintiff to drill certain oil wells. Defendant failed to furnish these articles and it was held that plaintiff was thereby prevented from performing. But there is no claim here that Appellant herein failed to furnish Appellee with the equipment necessary to accomplish his

work. On the contrary the entire dispute arose because Appellee deliberately refused to use the turnbuckles which were provided for him and which he was instructed to use.

Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29, cited by Appellee (Brief, p. 8), holds that where the owner of a building did not prevent or do anything excusing a contractor from completing performance of a building contract, the latter was not justified in refusing to complete the work merely because it became more difficult by reason of landslides from adjoining lots. The case squarely supports Appellant herein.

In *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (Appellee's Brief, p. 9), plaintiffs were employed as brokers to sell certain lots owned by defendant but were prevented from effecting sales solely because of defendants' refusal to perform his agreement to clear the title to the lots. The case has no application to the facts involved herein.

In *Crawford v. Pioneer Box & Lumber Co.*, 105 Cal. App. 760, 288 Pac. 694 (Appellee's Brief, p. 9), plaintiff recovered damages for breach of contract, the breach consisting of defendant's refusal of access to the land upon which certain timber was to be cut. The case has no application to the facts herein.

Appellee cites (Brief, p. 9) 12 American Jurisprudence, Sections 386 and 401. These sections very plainly deal with the *effect* of prevention, which is not in issue here. They do not touch upon the question of the existence or nonexistence of prevention which is the real issue.

Restatement of Contracts, Section 312, cited by Appellee (Brief, p. 9), states, in part:

“A breach of contract is a non-performance of any contractual duty of immediate performance.”

But Appellee admittedly refused to perform in accordance with Tam's orders and he admittedly refused to report back for work as instructed. Therefore, Appellee breached the contract.

The opinion of the District Court of Appeal in *Lockheed Aircraft Corporation v. Superior Court*, 67 A. C. A. 205, 153 P. (2d) 966 (hearing granted by Supreme Court), cited by Appellee (Brief, p. 9) holds in part that the statute forbidding employers from preventing employees from engaging in politics is constitutional and that an employee injured by violation of the statute has a right to recover damages therefor in a civil suit. The case does not have the remotest bearing on the issues in this case.

IV.

No Argument Over Measure of Damages.

Appellee's Point III dealing with the measure of damages as applied by the trial court in this case is entirely immaterial. In the court below, Appellee attempted to recover damages in the sum of \$4,015. [Tr. p. 4.] But in accordance with the express language of the contract, the court limited damages to the sum of \$852.92 plus costs. [Tr. p. 32.] Appellant does not contend on appeal that the trial court awarded an incorrect amount of damages but rather that the trial court erred in awarding any damages at all.

V.

Conflict in Trial Court's Findings.

Under Point IV of his Brief, Appellee cites authority in support of the general rule that where there is any substantial evidence in support of the trial court's findings of fact such findings will not be disturbed upon appeal. The corollary of this rule, of course, is that where there is no support in the evidence for such findings, they must be held to be erroneous.

Appellant earnestly insists that here the trial court committed error by expressly finding that Appellee was a "wilful contract breaker," which finding is fully supported by the evidence; and then making the further finding, without any support in the evidence whatever, that Appellant waived the breach on Appellee's part by ordering him to return to work under Tam, thereby making it impossible for Appellee further to perform his contract. A finding without any support in the record and in conflict with other findings must be set aside. *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490.

Conclusion.

For all of the reasons advanced in Appellant's Opening Brief and in this Reply Brief, it is, therefore, respectfully submitted that the judgment of the trial court should be reversed with instructions to enter judgment for Appellant.

Respectfully submitted,

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No. 11222.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a
corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

PETITION FOR REHEARING.

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DOYLE McDONALD,

Appellee.

PETITION FOR REHEARING.

Comes now the above named Appellee, Doyle McDonald, and presents his Petition for Rehearing in this case:

I.

The opinion of this Court was filed on October 11, 1946. This Petition is filed within less than thirty (30) days thereafter, in accordance with the provisions of Rule 25 of the Circuit Court of Appeals for the Ninth Circuit. The jurisdiction of this Court has otherwise been established in accordance with the briefs heretofore filed by the Appellant and the appellee, under which the issues and the jurisdictional facts were agreed between the parties hereto.

II.

On re-analysis it is found that the Circuit Court of Appeals is in error upon the principal question of general law involved, which question was the controlling factor in this case. The error lay in the Court's conclusion that McAuliffe could not have known all of the facts, having heard only Appellee's side of the controversy. Under these circumstances he could not have waived or condoned Appellee's breach of contract, since a waiver is an intentional relinquishment of a known right. In support of which the Court cites *Johnson v. Zerbst*, 304 U. S. 458, at 464, and *Gould v. Singh*, 88 Cal. App. 399, at 343. In arriving at the above conclusion the Court completely disregards the evidence and the testimony of McAuliffe himself, in which he stated that on July 9th, following his interview with McDonald, he had interviewed Tam, Gratz and Vessels, in order to arrive at the basic facts of the dispute between Tam and McDonald. The Court further disregards the fact which must have been paramount in the mind of the trial court, who alone was in a position to view the witnesses, to judge of their credibility and to determine the nature of the men involved in this vital dispute, that these men were residing in a tight-knit community on an isolated island of the Pacific Ocean, where investigative facts could be unfolded in a matter of minutes, rather than in a matter of days conceived by the Circuit Court.

Mr. McAuliffe, throughout his testimony, did not at any time seek to deny that he had made a thorough investigation of all the facts, including this controversy, nor did he deny that he was fully apprised of all the facts upon which he felt that he was warranted in making the decisions which were finally made. After investigat-

ing from 2 o'clock in the afternoon of July 9th until 10 o'clock of the morning of July 10th, Mr. McAuliffe was in the position to finally make this statement as to the results of his investigation [see Rep. Tr. p. 217]:

“Q. You saw no reason why he (McDonald) should be transferred? A. That is right.

Q. And did you see any reason why he should be discharged? A. No.”

It is upon the basis of this unequivocal affirmation by Mr. McAuliffe of his complete knowledge of the facts that the Appellee relied upon the case of *Goold v. Singh*, heretofore cited, for the principle of general law therein cited:

“Where a party to a contract recognizes its continued validity, with full knowledge of facts discharging him or giving him the right of forfeiture, he waives the breach as an excuse for not continuing to perform.”

To regard the above cited case as inapplicable or to distort its application to the facts in the instant case would constitute an usurpation by the Circuit Court of Appeals of the conclusive fact-finding powers of the trial court.

In addition to the conclusion of McAuliffe's investigation, the Court's attention is also invited to his testimony appearing at pages 193-194 of the Reporter's Transcript, which is set forth as follows:

“Q. Didn't you make an investigation after you had this discussion with Mr. McDonald, the first one? A. I definitely did.

Q. And did you make inquiry of anyone? A. Yes. I spoke to both Mr. Tam and Ed Gratz.

Q. Following your inquiries of Tam and Gratz, did you issue any instructions or give Mr. McDonald any reply: A. I issued instructions that McDonald go back to work.

Q. When did you do that? A. To the best of my memory, the following morning."

It was upon the basis of this testimony that the trial court properly found that the breach, if any, committed by McDonald had been condoned by the Appellant with a full knowledge of the facts warranting discharge and that this conduct of the Appellant constituted a waiver of the breach as an excuse for not continuing to perform. The second question which arises follows from the erroneous conclusion of the Circuit Court and that is that the conduct of the Appellant following its condonation of the breach by McDonald, if any, constituted a breach of contract in that the Appellant attached an unwarranted condition to its order requiring McDonald to return to work. This unwarranted condition constituted a prevention of performance by McDonald and justified the trial court's conclusion that this condition constituted one which was impossible in nature and gave rise to a breach of contract on the part of Appellant. That this finding by the trial court is correct in principle is supported in the case of *Woodruff v. Adams*, 134 Cal. App. 490, at page 495, where the court says:

"In an action for damages arising from prevention of performance of a contract, a notice by the defendant to the plaintiff to stop work until the defendant procured a loan constituted a prevention of performance where the plaintiff was ready, willing and able to continue with his work and was deterred

therefrom solely by the defendant, or his authorized agent, and not advised to continue within the period of approximately four months that ensued prior to filing suit.”

In the instant case McDonald, according to the undisputed evidence, was at all times ready, willing and able to perform his portion of the contract and the sole deterrent to his performance was the arbitrary and improper refusal of the Appellant to fulfill its obligations under the contract to provide employment for McDonald, in conformity with Paragraph I of its Employment Agreement, which reads as follows:

“Paragraph I. Time and Place of Service. Company hereby engages employee and employee hereby agrees to serve company as a boiler-maker (or in such other capacity as company may, from time to time require) in company's zone of operations for a period of eighteen months from the date employee shall report for duty at Bahrein, Persian Gulf, namely, As herein used 'Zone of Operations' is understood to mean Bahrein, Persian Gulf, and any other locality around the Persian Gulf to which employee may be transferred for service.”

See, also:

Millsap v. National Funding Corporation, 57 Cal. App. (2d) 772 at 777.

The Court violates the basic rule of contract construction in that it rigidly construes the instant contract in favor of the party drawing the contract, rather than pursuing the long established doctrine of this court that a contract will be construed most strictly against the framer

thereof. In no instance was the Appellee given the benefit of this rule in the decision heretofore filed. In that instance Appellee's rights materially suffered due to the court's error. The provision above cited created the obligation of McDonald to serve in a zone of operations anywhere in the Persian Gulf at the request of the Appellant and at any point to which he might be transferred for service. This provision also envisioned the possibility that the Appellee's services might be required in the function of boiler-maker, which was his specific craft, or in any other capacity which the company may, from time to time, require. Under this provision of the contract, even under the rigid if improper construction given it by the Court, the Appellant was under an obligation in fact, if not by implication, to provide employment for the Appellee at some point in the Persian Gulf where his relation with his immediate superior would be at least agreeable, if not pleasant. For the Court to determine that the Appellee was required by his contract to work under Tam, an admittedly inferior minion of the Appellant whose existence was not conceived by the parties at the time the contract was entered into, constitutes a most unrealistic conclusion.

When this principle is applied to the factual situation of heavy construction work being performed on a remote island, 8,000 miles in the Pacific, where the ruptures of human antipathies were accelerated by heat, disease, closeness to the job and inescapable proximities of man to man, it is inconceivable that the Court would require the Appellee to conduct himself under an utopian standard.

In view of the unequivocal affirmation by Appellant of its thorough investigation of the facts surrounding the purported altercation between McDonald and Tam, the trial court correctly ruled that the Appellant recognized the continued validity of the contract of employment with full knowledge of the facts, giving Appellant the right of forfeiture, and that Appellant therefore, by its conduct, waived the breach as an excuse for not continuing to perform. The evidence upon which this finding is based is uncontradicted and conclusive in character, and establishes a firm foundation for the affirmation of the decision of the trial court.

A correct ruling in accordance with the facts and the court decisions above quoted on the questions of general law herein cited could not have resulted in anything else except a different disposition of the case.

The above cited question is the controlling question in the instant case and the affirmative holdings herein cited are in direct conflict with the decision of this Court. The Court's attention is also requested to the case of *Stone v. Bancroft*, 139 Cal., page 78, and the case of *Stone v. Bancroft*, 112 Cal., page 652, at page 658; *Steelduct Company v. Henger-Seltzer Company*, 26 Cal. (2d), page 635 at page 646, where the Court says:

“Annexing an unwarranted condition to an offer of performance is a refusal to perform.”

Citing:

Loop Building Company v. DeCoo, 97 Cal. App. 354, at page 364.

III.

It is further submitted on the question of damages that in accordance with the Appellee's Brief, heretofore filed, the trial court properly found on the basis of Appellee's damages herein. It is further submitted that the damages of Appellee are not based upon the question of breach or performance of the contract of employment herein, but that the compensation allowed by the trial court constituted dismissal compensation under a voluntary provision set forth in the contract of employment entered into between the parties hereto. It is further submitted that this dismissal compensation is due and payable for the purpose of defraying, in some small regard, the expense and loss of time to an employee necessarily incident to his being disqualified from performance under situations akin to the instant case where the employee's opportunity to mitigate the losses incident to his inability to perform are necessarily delayed for a period of, as here, one month, before he could again arrive in the United States and again resume remunerative employment.

The provision for dismissal compensation was contemplated by the parties as a necessary incident to the restoration of Appellee to a position of *status quo* where, regardless of fault, the termination of his contract would force upon him a loss which the company or Appellant itself estimated as involving at least one month's compensation. This element of damage is properly recoverable and that the trial court was correct in its award of that amount is set out in the case of *MacDuff v. Earl C. Anthony*, 8 Cal. App. (2d), page 209, and a copious citation of authority and annotation of the principle therein involved is set forth in 147 A. L. R. at page 151.

IV.

For the foregoing reasons the Petitioner respectfully urges that a rehearing be granted. That, upon further consideration, the decision of October 11, 1946, be revoked and that judgment enter for Appellee.

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Attorneys for Petitioner and Appellee.

Certificate of Counsel.

I, E. W. Sheridan, counsel for the above named Appellee and Petitioner, Doyle McDonald, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

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